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Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the Petition of

ZUSMAN FIERSTIEN

For a Writ of Habeas Corpus.

ZUSMAN FIERSTIEN,

Appellant,

vs.

JOSEPH A. CONATY, Acting District Director of the Immigration Service of the United States Department of Labor, in and for the Los Angeles, California, District,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

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ZUSMAN FIERSTIEN
For a Writ of Habeas Corpus.

ZUSMAN FIERSTIEN,
Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellant:

JOHN BEARDSLEY, Esq.,

Rowan Building, Los Angeles, California.

For Appellee:

SAMUEL W. McNABB, Esq.,
United States Attorney;

P. V. DAVIS, Esq.,
Assistant United States Attorney,

Federal Building, Los Angeles.

United States of America, ss.

To JOSEPH A. CONATY, Acting District Director of the Immigration Service of the United States Department of Labor, In and For the Los Angeles, California, District, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 14 day of January, A. D. 1930, pursuant to order granting appeal in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain Matter of the petition of ZUSMAN FIERSTIEN for a Writ of Habeas Corpus and you are cited to show cause, if any there be, why the order discharging the Writ of Habeas Corpus in the said petition for appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Wm. P. James United States District Judge for the Southern District of California, this 17 day of December, A. D. 1929, and of the Independence of the United States, the one hundred and Fifty-fourth

Wm P. James

U. S. District Judge for the Southern District of California.

[Endorsed]: No. 9650 J Cr. In the United States Circuit Court of Appeals for the Ninth Circuit In the Matter of the Petition of Zusman Fierstien For a Writ of Habeas Corpus Rec'd copy hereof Dec 17 1929 Joseph A Conaty Act Dist. Director By Harry B. Blee Inspr. Filed Dec 17 1929 R. S. Zimmerman Clerk W. E. Grid-

ley Deputy Copy recd 12-17-29 S. W. McNabb U. S. Atty U. S. Atty by W. R. Gallagher Asst John Beardsley, Rowan Bldg Los Angeles Atty. for Petitioner

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DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA

In The Matter Of The Petition Of	)	
	)	
ZUSMAN FIERSTIEN	)	No.
	)	
For A Writ Of Habeas Corpus	)	

PETITION FOR WRIT OF HABEAS CORPUS

To: The Honorable District Court of the United States, In and For the Southern District of California:

The Petition of ZUSMAN FIERSTIEN respectfully alleges and shows to the Court:

I

That your petitioner is imprisoned and restrained of his liberty by Joseph A. Conaty, Acting District Director of the Immigration Service of the United States Department of Labor, in and for the Los Angeles, California, District of that Service; that said restraint is in violation of the constitution and laws of the United States; that petitioner has no plain, speedy or adequate remedy at law, nor any remedy or means of determining the legality of his detention other than by habeas corpus proceedings.

II

That the facts showing the illegality and unconstitutionality of petitioner's detention and restraint are as follows, to wit:

1. That petitioner is an alien and a citizen of Russia, and a resident of the City of Los Angeles, State of California.

2. That the restraint and detention of your petitioner by the said Acting District Director of Immigration at Los Angeles is claimed by said Acting Director of Immigration to be based upon an order of deportation issued by the Secretary of Labor of the United States of America, under date of February 21, 1929.

3. That said order directs that petitioner be deported to Russia on the following charges:

That he has been found in the United States in violation of the Immigration Act of October 16, 1918, as amended by the Act of June 5, 1920, in that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purposes of circulation, distribution, publication, issue or display, written or printed matter advising, advocating or teaching the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized Government; that he is a member of or affiliated with an organization, association, society or group that writes, circulates, distributes, prints, publishes, or displays or causes to be written, circulated, distributed, printed, published or displayed or that has in its possession for the purpose of circulation, distribution, publication, issue or display, written or printed matter advising, advocating or teaching the unlawful damage,

injury or destruction of property; and that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes or displays, or causes to be written, circulated, distributed, printed, published or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, written or printed matter advising, advocating or teaching sabotage.

4. That said order of deportation was issued and made after a hearing before an officer of the Immigration Service of the United States in the offices of that Service in the City of Los Angeles, State of California, on October 20, 1928, November 5, 1928 and on November 13, 1928, upon an order to show cause why your petitioner should not be deported from the United States.

5. That the charges as above set out upon which said order of deportation is based are not true and that no evidence of the truth of said charges was given or produced at said hearing or hearings on the order to show cause why this petitioner should not be deported.

6. That said hearing upon said order to show cause was not fair to your petitioner in the following particulars:

(a) That all or practically all of the documentary evidence submitted against your petitioner in those proceedings was seized from the premises and possession of your petitioner by an Immigration Inspector in the employ of the Immigration Service of the United States, and Officers of the Police Department of the City of Los Angeles, without a search warrant and in violation of the Constitution of the United States, and was received in evidence by the examining inspector of the Immigration Department over the objection of your petitioner and

dispite his oral and written demand made promptly at the opening of said hearing on the order to show cause, that said evidence be returned to him.

(b) That there was received in evidence against your petitioner at said hearing and over his objection a transcript of an interview had by William F. Hynes, a Detective Lieutenant of the Los Angeles Police Department, at which interview your petitioner was refused and denied the right to be represented by counsel, although he had specifically demanded that right; that said interview was held at the City Jail Building in the City of Los Angeles, while your petitioner was a prisoner and in the custody of said Lieutenant Hynes; that your petitioner was not advised by said Detective Lieutenant nor by any one else that he had a right to be represented by counsel and that whatever statement he might make might be used against him; that your petitioner was compelled through the influence of fear and in the presence of three armed police officers, to make statements, including admissions, which statements and admissions were used against your petitioner over his objections at said hearing on order to show cause; that when said interview was had at said Los Angeles City Jail Building, your petitioner was without counsel and was unadvised of the nature of the proceeding against him, and no charge had been lodged against him, and no bail had been fixed; that at said interview your petitioner was compelled to testify against himself; that by the admission of said transcript against petitioner at the hearing on the order to show cause why he should not be deported, your petitioner was again compelled to testify against himself.

(c) That your petitioner was denied the right to produce certain evidence on his own behalf by the Immigration Inspector in charge of the hearing, which Inspector made statements of fact into the record, he not being under oath, and said Inspector refused to submit to

cross-examination on the matters of fact testified to by him, although counsel for your petitioner demanded that said Inspector submit to cross-examination.

III

That all of the evidence received against your petitioner at the hearings on the order to show cause why petitioner should not be deported, is in the possession of the Secretary of Labor of the United States, and petitioner has not and cannot produce a copy thereof.

IV

That Joseph A. Conaty, Acting District Director of Immigration, threatens and intends to deport your petitioner from the United States and will do so unless restrained by this Honorable Court.

WHEREFORE your petitioner prays that a Writ of Habeas Corpus issue, and that said Joseph A. Conaty, as Acting District Director of Immigration, be required to produce the body of your petitioner before the court, that the matter may be heard and that such disposition of the matter may be made as to the Court shall seem just.

Dated: Los Angeles, California, April 8, 1929.

Zusman Fierstien

Petitioner

John Beardsley
Attorney for Petitioner

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

ZUSMAN FIERSTIEN being by me first duly sworn, deposes and says that he is the Pettiioner in the above entitled action; that he has heard read the foregoing petition and known the contents thereof; and that the same is true of his own knowledge, except as to the matters

which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Zusman Fierstien

Subscribed and sworn to before me this 8th day of April, 1929.

[Seal] C. E. Beardsley

Notary Public in and for the County of Los Angeles State of California

[Endorsed]: 9650-J Cr. District Court of the United States Southern District of California In The Matter Of The Petition Of Zusman Fierstien For Writ of Habeas Corpus Petition Filed Apr. 8, 1929 R. S. Zimmerman, Clerk, by B. B. Hansen, Deputy Clerk Law Offices of John Beardsley 610-612 Rowan Building Los Angeles TUcker 1881

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA

In The Matter Of The Petition Of	)	
	)	
ZUSMAN FIERSTIEN	)	No. 9650 J Cr
	)	
For A Writ Of Habeas Corpus	)	

ORDER FOR WRIT OF HABEAS CORPUS

Upon reading the verified complaint of ZUSMAN FIERSTIEN and good cause appearing therefor,

IT IS ORDERED

That a Writ of Habeas Corpus issue out of this Court directing the production of the body of said Zusman Fier-

stien before the Court on Monday, April 15, 1929, at 2 p M.

Dated: Los Angeles, April 8, 1929.

Wm P James

Judge

[Endorsed]: No. 9650 J Cr. District Court of the United States Southern District of California In The Matter Of The Petition Of Zusman Fierstien For Writ of Habeas Corpus Order for Writ Filed Apr. 8, 1929 R. S. Zimmerman, Clerk by B. B. Hansen, Deputy Clerk Law Offices of John Beardsley 610-612 Rowan Building Los Angeles TUcker 1881

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA

In The Matter Of The Petition Of	)	
	)	
ZUSMAN FIERSTIEN	)	No. 9650 J Cr
	)	
For A Writ Of Habeas Corpus	)	

WRIT OF HABEAS CORPUS

THE PRESIDENT OF THE UNITED STATES

To Joseph A. Conaty, Acting District Director of the Immigration Service of the United States Department of Labor, In and For the Los Angeles, California, District, GREETING:

YOU ARE HEREBY COMMANDED to have the body of ZUSMAN FIERSTIEN by you imprisoned, by whatever name he shall be called, the petitioner for a Writ of Habeas Corpus in the above-entitled case, before the

above-entitled Court and the Honorable..... Judge of said Court, at the court room of said Court in the City of Los Angeles, California, on the 15th day of April, 1929, at 2 p M, to do and receive what shall then and there be commanded in the premises, and have you then and there this writ.

WITNESS The Honorable W. P. James, Judge of the said United States District Court, for the Southern District of California, Southern Division.

Dated: April 8 1929

R S ZIMMERMAN Clerk

[Seal] By B B Hansen Deputy Clerk

[Endorsed]: No. 9650 J Cr District Court of the United States Southern District of California In The Matter Of The Petition of Zusman Fierstien For Writ of Habeas Corpus Writ Rec'd copy of within writ April 8, 1929, also copy of petition and order for writ. Joseph A. Conaty, Act. District Director of Immigration. Filed Apr. 8, 1929 R. S. Zimmerman, Clerk, by B B. Hansen, Deputy Clerk. Law Offices of John Beardsley 610-612 Rowan Building Los Angeles TUcker 1881

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the matter of	)	No. 9650-J
	)	RETURN TO
ZUSMAN FIERSTEIN	)	WRIT OF
	)	HABEAS
for a Writ of Habeas Corpus	)	CORPUS

I, Joseph A. Conaty, Acting District Director of the United States Immigration Service, Immigration District

No. 31, Los Angeles, California, Respondent herein, for my return to the Writ of Habeas Corpus in the above case admit, deny, and allege as follows:

I.

Respondent alleges that ZUSMAN FIERSTEIN Petitioner herein, is an alien, to wit: a native and subject of Russia, and of the Hebrew race; that he last entered the United States on or about July 30, 1920, at Niagara Falls, New York, without inspection under the Immigration Laws of the United States, since which time he has continued to reside in the United States; that on or about the 15th day of October, 1928, Petitioner was arrested by the so-called "Radical Section" of the Los Angeles, California, Police Department as an alien anarchist; that the matter was reported to Respondent who directed an investigation of the case and such investigation was instituted on the 18th day of October, 1928, at which time Petitioner was represented by counsel; that at the conclusion thereof the facts were presented to the Secretary of Labor at Washington, D. C., who caused his warrant to be issued directing that Petitioner be taken into custody and given a hearing to show cause why he should not be deported from the United States; that Petitioner was taken into custody under said warrant; that pending hearing Petitioner was released under bond; that hearings were accorded Petitioner on November 5, 1928, and on November 13, 1928, at both of which hearings Petitioner was represented by counsel; that thereafter Counsel submitted a brief which was transmitted with complete record of hearing to the Secretary of Labor at Washington, D. C.; that thereafter and on the 21st day of February, 1929, the Secretary of Labor issued his warrant directing de-

portation of Petitioner to Russia on the ground that he had "been found in the United States in violation of the Immigration Act of October 16, 1918, as amended by the Act of June 5, 1920, in that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue or display, written or printed matter advising, advocating, or teaching the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government; that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, published, or displays or causes to be written, circulated, distributed, printed, published or displayed or that has in its possession for the purpose of circulation, distribution, publication, issue or display, written or printed matter advising, advocating or teaching the unlawful damage, injury or destruction of property; and that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, written or printed matter advising, advocating or teaching sabotage."

II.

Respondent admits that he is restraining Petitioner, as alleged in paragraph I of the petition, but denies that said

restraint is in violation of the constitution and laws of the United States, or that such restraint is in any manner illegal.

III.

Respondent admits that Petitioner is an alien and a citizen of Russia and a resident of Los Angeles, California, as set forth in allegation II of the petition. Respondent further admits that such restraint is authorized by a warrant of deportation issued by the Secretary of Labor and dated the 21st day of February, 1929. Respondent further admits that the grounds for deportation are clearly set forth in paragraph 3 of allegation No. II. Respondent alleges that hearings which resulted in the order of Petitioner's deportation were held in Los Angeles, California, on October 18, 1928, November 5, 1928, and November 13, 1928, and denies that part of paragraph 4 of allegation No. II of the petition wherein it is stated that one of said hearings was held on October 20, 1928. Respondent denies the truth of paragraph 5 of allegation No. II of the petition wherein it is stated that the charges set out in the warrant of deportation are not true and that there was no evidence produced at the hearing to show cause to support said charges, but alleges that said charges were true and were supported by ample evidence of their truth. Respondent denies the truth of that part of allegation No. II, paragraph 6, subdivision (a), wherein it is stated that practically all of the documentary evidence submitted against Petitioner was seized by an immigrant inspector in the employ of the U. S. Immigration Service. Respondent alleges that such documentary evidence was not seized by an inspector of the Immigration Service. As to that part of the same allegation wherein it is

alleged that practically all of the documentary evidence submitted against Petitioner was seized by officers of the Police Department of the City of Los Angeles, Respondent has no knowledge, information or belief sufficient to answer such allegation, and on that ground denies same. As to allegation No. II of the petition, paragraph 6, subdivision (b) thereof, Respondent admits that at the hearing to show cause, and over objection of counsel for Petitioner, there was received in evidence transcript of a certain statement made by William F. Hynes, Detective Lieutenant of the Los Angeles, California, Police Department on November 5, 1928, in the presence of Petitioner and Petitioner's counsel, but as to that part of said allegation wherein Petitioner refers to a certain statement alleged to have been made in the City Jail at Los Angeles, California, by Petitioner to the aforesaid William F. Hynes, Respondent has no knowledge, information or belief sufficient to answer same, and on that ground denies same. As to that part of allegation No. II of the Petition, subdivision (c) of paragraph 6, wherein it is alleged that the immigrant inspector in charge of the hearing to show cause denied the right of Petitioner to produce certain evidence at such hearing in his own behalf, Respondent denies that said inspector denied the introduction of any evidence pertinent to the matter under hearing. As to that part of allegation No. II of the petition, paragraph 6, subdivision (c), wherein it is stated that the inspector who conducted the hearing to show cause refused to be sworn and to testify in the proceeding, Respondent admits that said inspector refused to testify, but denies that the statement made by said inspector as appearing in the record of hearing to show cause was material to the issue involved.

IV.

Respondent admits that part of allegation No. III of the petition wherein it is stated that all evidence received against Petitioner is in the possession of the Secretary of Labor of the United States, but alleges that it is not Respondent's purpose to deprive Petitioner or this Honorable Court from reviewing said evidence, and that Respondent has requested the Secretary of Labor to forward the complete record of hearing relative to this Petitioner in order that said record may be filed in this habeas corpus proceedings.

V.

Respondent admits the truth of allegation No. IV of the petition.

VI

Respondent alleges that the proceedings which resulted in the order of deportation of Petitioner were fair and were conducted in accordance with the law and the rules and regulations based thereon, and that Petitioner has been deprived of none of his legal rights. However, in accordance with the writ of habeas corpus served herein, Respondent herewith produces the body of Petitioner, Zusman Fierstien, and prays dismissal of this writ of habeas corpus, and further prays that Zusman Fierstien, be remanded to said Respondent for deportation in accordance with the terms of the warrant in Respondent's possession.

Joseph A. Conaty

Joseph A. Conaty,

Acting District Director.

STATE OF CALIFORNIA)
County of Los Angeles) SS

JOSEPH A. CONATY, Acting District Director of the United States Immigration Service, District No. 31, Respondent herein, being first duly sworn, deposes and says that he is the person who makes the foregoing return; that he has read the same and knows the contents thereof; and that same is true excepting as to those matters stated therein on his information and belief, and as to those matters he believes it to be true.

Joseph A. Conaty
Joseph A. Conaty,
Acting District Director.

Subscribed and sworn to before me this 12th day of April, 1929.

R S Zimmerman
[Seal] Clerk of U. S. District Court
By Edmund L Smith
Deputy.

[Endorsed]: Original No. 9650-J In the District Court of the United States for the Southern District of California Central Division In the Matter of Zusman Fierstein For a Writ of Habeas Corpus Return to Writ Received copy of within writ this 12 day of April 1929 John Beardsley (B. B) Attorney for Alien Filed Apr. 12, 1929 R. S. Zimmerman, Clerk. By B. B Hansen, Deputy Clerk

At a stated term, to wit: The September Term, A. D. 1929 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 29th day of November in the year of our Lord one thousand nine hundred and twenty-nine.

Present:

The Honorable WM. P. JAMES, District Judge.

In the Matter of the Petition of	)	
	)	
ZUSMAN FIERSTIEN	)	No. 9650-J Crim.
	)	
for a Writ of Habeas Corpus	)	

This matter having been heretofore submitted to the Court on briefs of counsel and same having been filed and considered by the Court, together with original records of the Immigration Bureau, and the Court being fully advised as to the law, now files its written Opinion and orders that the petitioner be, and he is remanded to the custody of the Immigration Officers for deportation, and the petitioner is allowed until the hour of 5 o'clock p. m., December 10th, 1929, to surrender himself to the said authorities.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

IN RE ZUSMAN FIERSTIEN	)	No. 9650-J. Cr.
	)	OPINION AND
ON HABEAS CORPUS.	)	ORDER.

The Secretary of Labor has issued his warrant requiring the deportation of the petitioner, who is an alien and a native of Russia. As justification for the order of de-

portation it was charged that the alien was one of the kind described in the Immigration Act as belonging to a class required to be excluded from admission into the United States. Vol. 8, Sec. 137, Subd. (c), (d), U. S. Code. A writ was issued upon the petition of the alien, on whose behalf it is contended that he was not given a fair hearing; that evidence was used against him which was taken from his possession illegally; and that the evidence was not sufficient to sustain the charges made.

Police detectives of the city of Los Angeles, on the day of the arrest of petitioner, went to a certain house wherein an individual named Spector, who had been previously arrested by the police, resided, for the evident purpose of again taking into custody the person referred to. The petitioner was found in the room, and was placed under arrest. One of the police detectives testified at the hearing before the immigration officers that "both Spector and this alien were arrested on suspicion of criminal syndicalism, a charge of felony." The room was searched at the time, and a number of papers, journals and pamphlets were found which referred to communism. Included in the property found upon the search was a card showing membership in the Workers' Communist Party of America, and issued in the name of petitioner. An immigration inspector, the same who conducted the examination later of the alien, was present with the police detectives at the time the arrest and search were made. At the principal hearing had, the alien was represented by an attorney who took an active part in the proceeding. The alien himself testified at considerable length, both upon direct examination by the inspector, and cross examination by his own counsel.

Passing for the moment to the question as to whether documents taken from the alien's room were illegally seized, it cannot be said upon the whole record that the proceedings were conducted in any manner other than fair, or that the alien was prevented from showing fully any facts which he may have desired to introduce into the record. The objection was seasonably made, and the protest of the alien in that regard was continuous throughout the course of the proceedings, that the documents and papers taken were not legal evidence and should be suppressed.

The case was taken to a board of review and the action of the local immigration officers was sustained. The board of review, in making its final conclusion, stated that the charges were sustained without the use of or reference to the documentary evidence obtained from the room of the alien. As that decision seems to be supported by the record, it will not be necessary to discuss with particularity the question as to whether the papers and documents, possession of which was obtained without the use of a search warrant, should be considered. It may be stated, nevertheless, that it seems fairly clear that the evidence objected to was obtained in a lawful manner; and this, even though the immigration inspector, as an officer of the United States, is chargeable with the acts and conduct of the police detectives who searched the room and took possession of the things they found therein, of the kind hereinbefore referred to. This for the reason that officers may make arrests without a warrant upon a belief reasonably entertained by them, that the person to be arrested has committed a felony, and that as an incident accompanying such an arrest, such officer has the right

to search, not only the person of the accused, but the room and immediate premises wherein he is found. Such is the law, not only of the state, but of the United States. Secs. 836, et seq., Penal Code of Cal. Agnello vs U. S., 269 U. S. 20; Marron vs U. S., 275 U. S. 192.

In his oral examination before the inspector, the alien admitted that he was a member of the Workers' Communist Party. He stated that he accepted the program and statutes of the Communist Internationale, and of the Workers' Communist Party. In response to the question, "It is the aim of the Workers' Communist Party to gain control of the government, is it not?" he first appealed to his attorney, and being advised to answer, said, "Yes, sir." He further gave this testimony:

"Q What does the workers of the Communist Party mean by the overthrow of the capitalist system of the United States?

A It simply means that the workers and poor farmers when they understand they are a class can just as well take over the government as the present officials of the government do it.

Q Tell me by what method?

A I don't know when this thing will ever happen; whatever that time may demand. So far, that party has legally on the ballot nominees in 34 states and asking the workers and poor farmers to work for them.

Q You say whenever that time will demand; do you mean whenever the Third Internationale orders it?

A No, sir.

Q What do you mean?

A I don't know what that demand would be.

Q You will follow the instructions of the Workers Communist Party when that time comes, will you?

A I don't know.

Q Will you, or will you not?

A I don't know what time that will be; it may be 100 years; I don't know."

Under cross examination by counsel for the alien, the police detective was asked whether it was his view that membership in a communist party was sufficient to warrant deportation. The conclusion called for of course was not competent, but the witness stated facts pertinent to the case when he answered:

"I don't know if I am qualified; I was formerly a member of the communist party in 1922; and I would say that the knowledge that I gained in the party at that time, and reading the various documents, books and papers issued by the Workers Communist Party of America and the Communist Internationale, I have no doubt but what in my mind but what the Communist Party is the party which believes in, teaches and advocates the overthrow of the Government of the United States and of all organized government by force and violence.

BY Attorney: Q You have been a member of the Workers Communist Party of America, have you.

A I was a member of the Workers Party of America which is now the Workers Communist Party of America; and I may say I was a member of the Workers Party of America in Los Angeles and at the same time I was a member of the Los Angeles Police Department and it was in that connection I joined."

It may be stated that the alien, when specifically interrogated by his counsel on those matters, denied that the

use of force or the destruction of property was a part of the means contemplated to accomplish the aims of the Communist Party, with which he was affiliated.

If by an examination of the testimony heard by the immigration officers, it can be said that there is any substantial evidence warranting the conclusions drawn, the decision must be sustained, and the courts will allow for every reasonable implication to be drawn by such officers from the evidence presented. Pertinent cases wherein similar questions were considered and where the charges were of the kind involved in this case are:

Skeffington vs Katzeff, 277 Fed. (C. C. A. 1st) 129;

Antolish vs Paul, et al, 283 Fed. (C. C. A. 7th) 957;

Ungar vs Seaman, 4 Fed. (2nd) (C. C. A. 8th) 80;

Ex parte Jurgans, 17 Fed. (2nd) (D. C.) 507.

It is ordered that the writ be discharged, and the petitioner remanded to the custody of the immigration officers for deportation in accordance with the direction of the warrant of the Secretary of Labor. Petitioner may desire to appeal; in which event he will be allowed until five o'clock on the 10th day of December, 1929, in which to surrender to such custody.

Dated this 29th day of November, 1929.

Wm. P. James
U. S. District Judge.

[Endorsed]: No. 9650-J-Cr U S District Court Southern District of California In re Zusman Fierstien on Habeas Corpus. Opinion and order. Filed Nov 29 1929 R. S. Zimmerman, Clerk By Murray E. Wire Deputy Clerk.

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In The Matter Of The Petition Of)	
)	No. 9650 J
ZUSMAN FIERSTEIN)	PETITION
)	FOR APPEAL
For A Writ Of Habeas Corpus)	

To The Honorable Wm. P. James, Judge:

The above named petitioner, feeling himself aggrieved by the order made and entered in this cause, discharging the Writ of Habeas Corpus, on November 29, 1929, does hereby appeal from said order to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

John Beardsley

Solicitor.

The petition is granted and the appeal is allowed.
Dated Dec. 17, 1929.

Wm. P. James,

Judge.

[Endorsed]: No. 9650 J. District Court of the United States, Southern District of California, Central Division.

In The Matter Of The Petition of Zusman Fierstein For a Writ of Habeas Corpus. Petition for Appeal. Copy Recd 12-17-29, S. W. McNabb, U. S. Atty, by W. R. Gallagher. Filed Dec 17 1929, R. S. Zimmerman, Clerk, By W. E. Gridley, Deputy Clerk. Law Offices of John Beardsley 610-612 Rowan Building, Los Angeles, TUcker 1881.

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In The Matter Of The Petition Of	)	
	)	No. 9650 J
ZUSMAN FIERSTEIN	)	ASSIGNMENT
	)	OF ERRORS
For A Writ Of Habeas Corpus	)	

And now, on this, the 17th day of December, 1929, came the Petitioner Zusman Fierstein by his Solicitor, John Beardsley, and says that the order entered in the above cause on the 29th day of November, 1929, is erroneous and unjust to petitioner,

FIRST: Because petitioner was not given a fair hearing before the Immigration Service and the Department of Labor.

SECOND: Because evidence was used against petitioner which had been taken from his possession illegally.

THIRD: Because the evidence was not sufficient to sustain the charges made and the issuance of the warrant of deportation.

FOURTH: Because the findings upon which the warrant of deportation was based are in the alternative, and therefore no findings at all.

FIFTH: That the record before the Court is admittedly incomplete, since none of the exhibits received at the hearing as shown by the record, is included in the record.

WHEREFORE, petitioner prays that the said Order be reversed and that the Writ be sustained and the prisoner discharged.

Respectfully submitted
John Beardsley
Solicitor

[Endorsed]: No. 9650 J District Court of the United States, Southern District of California Central Division In the Matter of the Petition of Zusman Fierstein For Writ of Habeas Corpus Assignment of Errors Copy Recd 12-17 '29 S. W. McNabb U. S. Atty by W. R. Gallagher Filed Dec 17 1929 R. S. Zimmerman, Clerk By W. E. Gridley Deputy Clerk Law Offices of John Beardsley 610-612 Rowan Building Los Angeles TUcker 1881

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In The Matter Of The Petition Of	)	
	)	No. 9650 J
ZUSMAN FIERSTEIN	)	NOTICE OF
	)	APPEAL
For A Writ Of Habeas Corpus	)	

To JOSEPH H. CONATY, Acting District Director of the Immigration Service of the United States Department of Labor, and

To S. W. McNABB, Esq., United States Attorney, his attorney:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that Zusman Fierstein, above named, has ap-

pealed and does hereby now appeal from that certain order, judgment and decree made herein by the above entitled court on November 29, 1929, discharging the Writ of Habeas Corpus herein and remanding appellant to the custody of the United States Immigration officers, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

YOU ARE FURTHER NOTIFIED that on December 17, 1929, Hon. Wm. P. James, Judge of the above entitled Court, by order duly given and made, allowed the appeal, and that the record and papers of the file of the United States Department of Labor and of the above entitled Court will be forwarded and filed with the clerk of the U. S. Circuit Court of Appeals for the Ninth District of San Francisco, California, on or before January 14, 1930.

Dated this 20th day of December, 1929.

John Beardsley

Attorney for Zusman Fierstein, Appellant.

[Endorsed]: No 9650 J Cr District Court of the United States, Southern District of California Central Division In the Matter of the Petition of Zusman Fierstein For a Writ of Habeas Corpus Notice of Appeal Copy recd 12-20-29 P. V. Davis Asst. U. S. Atty Filed Dec 20 1929 R. S. Zimmerman, Clerk By W. E. Gridley Deputy Clerk Law Offices of John Beardsley 610-612 Rowan Building Los Angeles TUcker 1881

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In The Matter Of The Petition Of	No. 9650 J
	STIPULATION
ZUSMAN FIERSTEIN	re Original Record and File of
For A Writ Of Habeas Corpus	Department of Labor

IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN John Beardsley, attorney for Zusman Fierstein, appellant, and S. W. McNabb, U. S. Attorney, as attorney for Joseph H. Conaty, Acting District Director of the United States Immigration Service, appellee, that the original file and record of the Department of Labor covering the deportation proceedings against the petitioner, which was filed at the hearing on the return in the above entitled cause, may be by the clerk of this court sent up to the clerk of the Circuit Court of Appeals for the Ninth Circuit as part of the appellate record, in order that the said original immigration file may be considered by the Circuit Court of Appeals for the Ninth Circuit in lieu of a certified copy of said record and file and that said original records may be transmitted as part of the appellate record.

Dated this 20 day of December, 1929.

John Beardsley
Attorney for Zusman Fierstein Appellant,
S. W. McNabb
U. S. Atty,
By P. V. Davis Ass't U. S. Atty
Attorney for Joseph H. Conaty, Acting District Director of the United States Immigration Service. Appellee.

[Endorsed]: No 9650 J Cr District Court of the United States Southern District of California Central Division In the Matter of the Petition of Zusman Fierstein For a Writ of Habeas Corpus Stipulation re Original Record and File of Department of Labor Filed Dec 20 1929 R. S. Zimmerman, Clerk By W. E. Gridley Deputy Clerk Law Offices of John Beardsley 610-612 Rowan Building Los Angeles TUcker 1881

Know all Men by These Presents

That we, ZUSMAN FIERSTIEN, as principal and SAM SHULEM and BESSIE SHULEM, as Sureties are held and firmly bound unto THE UNITED STATES OF AMERICA in the full and just sum of TWO HUNDRED AND FIFTY - - - - - - - - - - - - Dollars ($250.00) to be paid to the said THE UNITED STATES OF AMERICA certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of February, in the year of our Lord One Thousand Nine Hundred and thirty.

WHEREAS, lately at the District Court of the United States for the Southern District of California, Southern Division, in a suit depending in said Court, between THE UNITED STATES OF AMERICA, acting through Joseph A. Conaty, Acting District Director of Immigration, and ZUSMAN FIERSTIEN a Judgment was rendered against the said ZUSMAN FIERSTIEN, and the said ZUSMAN FIERSTIEN having obtained from said

DISTRICT COURT OF THE UNITED STATES an order allowing appeal to reverse the Judgment in the aforesaid suit, and a Citation directed to the said Joseph A. Conaty citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, February 14, 1930.

Now, the condition of the above obligation is such, that if the said ZUSMAN FIERSTIEN shall prosecute his appeal to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

Zusman Fierstien [SEAL]
Principal.

3726 Ramona Blvd.
(Address)

Sam Shulem
Surety.

Bessie Shulem
Surety.

[SEAL] Leo Gallagher

Notary Public in and for Los Angeles County
State of California.

My Commission Expires July 26, 1931.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF CALIFORNIA } ss:
COUNTY OF Los Angeles

Sam Shulem and Bessie Shulem being duly sworn, each for himself desposes and says, that he is a freeholder in said District, and is worth the sum of Five Hundred Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Subscribed and sworn to before me, this eleventh day of February A. D. 1930

Sam Shulem
Surety.
2723 Malebar St.,
(Address)
Bessie Shulem
Surety.
2723 Malebar St.,
(Address)
Los Angeles, Calif.

[SEAL] Leo Gallagher
Notary Public in and for Los Angeles County
State of California
My Commission Expires July 26, 1931.

[Endorsed]: No. 9650-J United States District Court Southern District of California Southern Division In The Matter of the Petition of Zusman Fierstien Plaintiff, vs. For Writ of Habeas Corpus Defendant. Cost Bond on Appeal This bond is approved. Wm. P. James Judge. Filed Feb 12 1930 R. S. Zimmerman, Clerk B. B. Hansen Deputy.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In The Matter Of The Application Of	)	No. 9650 J
	)	PRAECIPE
ZUSMAN FIERSTEIN	)	FOR
	)	TRANSCRIPT
For Writ of Habeas Corpus	)	OF THE RECORD

TO THE CLERK OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

Please prepare and certify copies of the following papers to be used in preparing transcript on appeal:

(1) Petition for Writ of Habeas Corpus;
(2) Minute Order Directing that the Writ Issue;
(3) The Writ of Habeas Corpus;
(4) Respondent's Return to Writ;
(5) Opinion of the Court Dismissing Writ;
(6) Minute Order Dismissing Writ;
(7) Judgment and Order Dismissing Writ;
(8) Notice of Appeal;
(9) Petition for Appeal;
(10) Order Allowing Appeal;
(11) Assignment of Errors;
(12) Stipulation and Order regarding Immigration Record;
(13) Clerk's Certificate;
(14) Citation on Appeal;
(15) Order Enlarging Time for Filing Record on Appeal;

(16) Any other papers in the file of this Court, not including, however, the file of the Immigration Office and the Department of Labor.

Dated Los Angeles, California, January 29, 1930

John Beardsley

Attorney for Petitioner and Appellant

[Endorsed]: No 9650 J. In the United States District Court Southern District of California Central Division In the Matter of the Application of Zusman Fierstein For Writ of Habeas Corpus Praecipe for Transcript of the Record Filed Jan 29 1930 R. S. Zimmerman, Clerk By B. B. Hansen Deputy Clerk Law Offices of John Beardsley 610-612 Rowan Building Los Angeles TUcker 1881 Attorney for Petitioner and Appellant

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In The Matter Of The Application Of)	No. 9650 J
)	
ZUSMAN FIERSTEIN)	CLERK'S
)	CERTIFICATE.
For Writ of Habeas Corpus)	

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 32 pages, numbered from 1 to 32 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; petition for writ of habeas corpus; order for writ of habeas corpus; writ of habeas corpus; return to writ; minute order dismissing writ; opinion and order; petition for appeal, order allowing appeal, assignment of errors; notice of appeal; stipulation; bond and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of May, in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, and of our Independence the One Hundred and Fifty-fourth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

6672

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of the Petition of
ZUSMAN FIERSTIEN
For a Writ of Habeas Corpus.

Zusman Fierstien,
Appellant,

vs.

Joseph A. Conaty, Acting District Director of the Immigration Service of the United States Department of Labor, in and for the Los Angeles, California District,
Appellee.

APPELLANT'S BRIEF.

JOHN BEARDSLEY,
Attorney for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of the Petition of
ZUSMAN FIERSTIEN
For a Writ of Habeas Corpus.

Zusman Fierstien,
Appellant,

vs.

Joseph A. Conaty, Acting District Director of the Immigration Service of the United States Department of Labor, in and for the Los Angeles, California District,
Appellee.

APPELLANT'S BRIEF.

This matter comes before the court on appeal from the District Court of the United States, Southern District of California. Appellant Zusman Fierstien is an alien, a native and citizen of Russia. He is a member of the Communist Party, which has been known in the United States under several names during the past ten years, and solely because of his membership in that political party he has been ordered deported from the United States by warrant of the Secretary of Labor. Habeas corpus proceedings were brought on the alien's behalf, and the District Court,

Honorable William P. James presiding, on November 29, 1929, ordered that the writ be discharged and the petitioner remanded to the custody of the immigration officers for deportation in accordance with the direction of the warrant of the Secretary of Labor.

The deportation proceedings were instituted by the Immigration Service of the Department of Labor at its Los Angeles office. A telegraphic warrant from Washington was the basis for the alien's arrest. There followed a hearing before Immigrant Inspector Albert Del Guercio of the Los Angeles office of the department, upon an order against the alien to show cause why he should not be deported. The legal foundation for the proceedings is the Federal Alien Anarchy Statute under which numerous proceedings have been brought in Southern California and in various parts of the country, the persons proceeded against being in nearly all cases members of the Communist Party. This is the recognized, legally functioning, political party which had its ticket in the field in about thirty-four states of the Union in the election campaign of 1928. Its candidates polled upwards of 50,000 votes. So far as we are informed, no attempt has been made anywhere in the United States to make it a crime to be a member of the Communist Party. And, of course, those members of the party who are citizens of the United States are not subject to deportation or to any attack under the Alien Anarchy Statute. The Department of Labor has, however, taken the position that the Communist Party stands for and advocates the overthrow by force and violence of our Government, the assassination of Government officers, the destruction of property, and sabotage, which we under-

stand also to mean, in substance, injury to or destruction of property.

So far as we have been able to ascertain, there never has been a decision by any of the Federal Courts that membership in the Communist Party of itself is sufficient basis for deportation. At his hearing on order to show cause the appellant admitted his membership in the Communist Party, which at that time was functioning under the name Workers' (Communist) Party. That was the party name at the time these proceedings were had. Since then the party has adopted the name Communist Party of the U. S. A. In its earlier years the party used the name Communist Labor Party, and a little later it was known as the Workers' Party.

By whatever name it may be known, the Communist Party is unpopular in America. Its members and its leaders are agitators. They have come into conflict with the police in various parts of the country from time to time. Most recently, they attracted nation-wide, and perhaps world-wide, notice by their attempts to lead unemployment demonstrations in many cities on February 26 and again on March 6, 1930. In a few cities, notably San Francisco, Oakland and Baltimore, they were allowed by the police to parade and to indulge in soap-box oratory and to disperse in peace. But in other cities, including Los Angeles and New York, the police, by force and violence, prevented their attempted meetings and speech-makings, and it is common knowledge that a good many men went to the hospital with broken heads. It is not known how many of the agitators were citizens and how many were aliens. It appears that no favoritism was shown, and that citizens as well as aliens were clubbed by the police.

This brief reference to recent events is made here by way of sketching the background and the quite general attitude of our governmental authorities toward the members of this despised minority. It has been demonstrated repeatedly that it is only from the courts, and not from policemen or juries or even inspectors of the Immigration Department, that hated political and industrial agitators can hope for just and lawful treatment.

We respectfully suggest that this case is important particularly because of the need, in this critical time, of calm and dispassionate and judicial solutions of the pressing political problems which confront the Nation.

In this brief we shall contend that the decision of the District Court must be reversed for the following reasons, as set forth in our assignment of errors:

FIRST: Because petitioner was not given a fair hearing before the Immigration Service and the Department of Labor.

SECOND: Because evidence was used against petitioner which had been taken from his possession illegally.

THIRD: Because the evidence was not sufficient to sustain the charges made and the issuance of the warrant of deportation.

FOURTH: Because the findings upon which the warrant of deportation was based are in the alternative, and therefore no findings at all.

FIFTH: That the record before the court is admittedly incomplete, since none of the exhibits received at the hearing as shown by the record, is included in the record.

I.

Petitioner Was Not Given a Fair Hearing Before the Immigration Service and the Department of Labor.

Although deportation proceedings are brought against aliens, who have no rights as citizens, the law requires that a fair hearing must be accorded. In *Ungar v. Seaman,* 4 F. (2nd) 80, it is held that the right to a fair hearing includes the right to:

> "1. A definite charge with opportunity to the alien to read same.
> 2. Right of counsel.
> 3. Right to cross-examine.
> 4. Only competent evidence to be used."

We submit that the proceedings herein are not based upon a "definite charge". The indefiniteness of the charge is immediately apparent. As stated in the petition for writ of habeas corpus [Tr. p. 4], and again in the return to the writ [Tr. pp. 11 and 12], the charge upon which the warrant of deportation is based is as follows:

> "That he has been found in the United States in violation of the Immigration Act of October 16, 1918, as amended by the Act of June 5, 1920, in that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purposes of circulation, distribution, publication, issue or display, written or printed matter advising, advocating or teaching the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any

other organized Government; that he is a member of or affiliated with an organization, association, society or group that writes, circulates, distributes, prints, publishes, or displays or causes to be written, circulated, distributed, printed, published or displayed or that has in its possession for the purpose of circulation, distribution, publication, issue or display, written or printed matter advising, advocating or teaching the unlawful damage, injury or destruction of property; and that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes or displays, or causes to be written, circulated, distributed, printed, published or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, written or printed matter advising, advocating or teaching sabotage."

In his findings, the Inspector recommends the deportation of the alien upon the foregoing charges, and the additional charges:

"That he is a member of our affiliated with an organization, association, society, or group, that advises, advocates or teaches opposition to all organized government; that he is a member of or affiliated with an organization, association, society, or group, that believes in, advises, advocates, or teaches the overthrow by force or violence of the Government of the United States, or of all forms of law."

All of the foregoing charges are stated in the alternative and disjunctive. Certainly they are not "definite". We shall touch upon this point briefly again when we discuss the proposition that the findings are in the alternative, and in effect no findings at all.

The right to cross-examine, included by the Supreme Court in *Ungar v. Seaman, supra,* as a right which may not be denied the alien, was denied the appellant by the

Immigrant Inspector who stated at page 14 of the Inspector's Transcript:

> "For the purpose of the record, I wish to state I was present at the time and I asked the alien to come to the Immigration office; and the arrest was not made by Lieutenant Hynes; but he was asked to come to our office for an investigation in regard to his right to be and remain in the United States. You may proceed with the question to the witness.
>
> By Attorney: I want to ask you a question now.
>
> By Inspector Del Guercio: I will not answer you any question; I am not on the stand.
>
> By Attorney: But you want us to understand police officers did not arrest Fierstien, but you did?
>
> By Inspector: The record clearly shows that.
>
> By Attorney: I will ask Officer Hynes who arrested this man?
>
> A. I did on the charge of suspicion of Criminal Syndicalism."

Here we have an Immigrant Inspector acting in the triple capacity of arresting officer, prosecuting officer and judge. It might well be said that he acted in a fourth capacity, that of witness. Detective Lieutenant Hynes testified that he had arrested the alien on an occasion when in company with Inspector Del Guercio (who was conducting this hearing) he went to the alien's residence in connection with the case of Frank Spector, another alien against whom deportation proceedings were brought. The inspector himself flatly contradicted Officer Hynes and seemed to clinch the point that as a Government inspector he had participated in a raid without a search warrant upon the alien's premises, and in the arrest of the alien without a warrant. Counsel sought by cross-examination

of the inspector to clarify the situation so that there might be no doubt that Inspector Del Guercio had made the arrest. Having made the arrest, and having made unsworn statements of facts into the record, and having refused to submit to cross-examination, it was manifestly unfair that Inspector Del Guercio should be permitted to act as prosecutor and as quasi-judge. As such, he was in a position to approve, by his findings and recommendations to the department, his own illegal and unjustifiable participation in a raid without a search warrant and an arrest without a warrant. Who could be so naive as to expect Inspector Del Guercio, sitting as judge, to repudiate the conduct of Inspector Del Guercio acting as policeman?

"Only competent evidence to be used" is the fourth indispensable element of a fair hearing as laid down by the Supreme Court in *Ungar v. Seaman, supra.* All of the evidence seized in the raid, by Inspector Del Guercio and Police Lieutenant Hynes, upon the alien's premises, was received in evidence over the objection and against the protest of counsel. As stated by Judge James in his opinion and order, the objection to the evidence and the demand for its return were seasonably made. This demand was refused. The Reviewing Officer in the Department of Labor in his decision stated that because of this objection and demand for the return of the evidence, he had discarded the evidence and was not influenced by it in his decision. And yet he proceeded to refer to the evidence as support for his findings and the warrant of deportation. (We have not been afforded a copy of the departmental decision and cannot cite the page and line of the reviewing officer's comment.)

II.

Evidence Was Used Against Petitioner Which Had Been Taken From His Possession Illegally.

This point has been discussed to some extent in the foregoing paragraph I on the subject of the unfairness of the hearing. It is the habit of immigration inspectors to employ the assistance of local police in obtaining evidence against aliens, and afterwards to admit the evidence upon the ground that if the evidence was seized illegally it was seized by others than federal employees, for whose conduct the Government is not responsible.

In the present case, however, the proof clearly shows that the Government's own employee had participated in the unconstitutional and illegal search and seizure and arrest. This, of course, under the decisions of the Supreme Court, was error. And we submit that the court will hardly approve the action of the reviewing officer at Washington in using the evidence thus received in arriving at his decision, and failing to include the exhibits in the record submitted to the court.

III.

The Evidence Was Not Sufficient to Sustain the Charges Made and the Issuance of the Warrant of Deportation.

Upon this point alone, we submit, the decision herein would have to be reversed if there were no other error. The court will observe that the warrant of deportation is based upon findings which boil down to this:

That the alien is a member of an organization which advocates the unlawful assaulting or killing of any officers,

and which advocates the unlawful damage, injury or destruction of property, and which advocates sabotage.

The two additional charges are:

Membership in an organization which advocates opposition to organized Government and membership in an organization which advocates the overthrow by force or violence of the Government.

These two additional charges were discarded by the Secretary of Labor, although the Immigrant Inspector in his findings and recommendation held that those charges also had been proved. Judge James in his opinion and order discharging the writ of habeas corpus, seems to rest entirely upon the testimony of Lieutenant Hynes that in his opinion the Communist Party teaches and advocates the overthrow of the Government of the United States and of all organized government by force and violence. [Tr. p. 21.] The trial judge then cites cases in support of the proposition of law that if by an examination of the testimony heard by the immigration officers, it can be said that there is any substantial evidence warranting the conclusions drawn, the decision must be sustained, and the courts will allow for every reasonable implication to be drawn by such officers from the evidence presented. [Tr. p. 22.]

The difficulty is that the evidence quoted by the trial judge was evidence in support of an entirely separate and independent charge against the alien, which charge the reviewing officer had discarded. There is nothing in the testimony of Lieutenant Hynes touching at all any one of the charges upon which the warrant of deportation is based. Lieutenant Hynes said nothing about the unlawful assaulting or killing of officers, or the unlawful damage or

injury or destruction of property, or sabotage. Nor did any other witness touch upon or even hint at either of those three subjects. It is conceivable that the papers, pamphlets, and books received in evidence by the inspector and discarded by the reviewing officer, and not furnished to the court, with the record, might have contained language which would tend to support those charges. If they did, it is manifest that none of such exhibits or their contents may be considered here.

IV.

The Findings Upon Which the Warrant of Deportation Was Based Are in the Alternative, and Therefore No Findings at All.

As his basis for the order of deportation, the Secretary of Labor makes his findings in the language of the statute and of the charges against the alien in the order to show cause why he should not be deported. It is found that the alien "is a member of *or* affiliated with an organization, association, society, *or* group that writes, circulates, distributes, prints, publishes, *or* displays, *or* causes to be written * * * *or* that has in its possession for the purpose of circulation * * *." Nowhere is there a specific finding of a specific fact.

In *Ex Parte Rodriguez*, 15 Fed. (2nd) 875, there was a finding that the alien was convicted of or admitted the commission of a crime involving moral turpitude.

Of this the court said:

> "That the finding of the secretary on this point is too indefinite to support the warrant I think clear, because the finding is in the alternative, and therefore meaningless, since it does not find either that he has

been convicted of, or that he admits, but finds that he did one or the other, which is in effect no finding." (879.)

V.

The Record Before the Court Is Admittedly Incomplete, Since None of the Exhibits Received at the Hearing as Shown by the Record, Is Included in the Record.

The Secretary of Labor has seen fit to withdraw from the record before transmitting it from Washington to the clerk of the District Court, the various parcels of printed matter taken from the alien's place of residence and introduced against him as exhibits in support of the charges. Yet, in his written opinion which accompanies the findings sustaining the charges against the alien, the reviewing officer comments upon the nature of the Workers' (Communist) Party, as indicated by the exhibits. The exhibits were received in evidence over the objection of counsel for the alien. They were shown to have been seized without a search warrant and in violation of the Federal Constitution in the presence of, if not with the actual participation of a Government immigration officer. The Honorable Secretary seeks to overcome that objection by omitting the exhibits from the record. Presumably the contents of those exhibits would afford the court a basis in some measure in determining whether or not the alien's political party does stand for the assassination of Government officers or the destruction of property. The court is not permitted to study those exhibits. Possibly they contain a complete refutation of the charges upon which the warrant is based. Conceivably they contain vigorous exhortations against all violence. How is the court to know what this political

party advocates if the court is not allowed a glimpse of the party's printed enunciations of principles.

It would seem that no authority need be cited in support of the proposition that no record of proceedings which is manifestly incomplete can be construed as supporting the warrant of deportation.

In *Kwock Jan Fat v. White*, 253 U. S. 454, reversing 255 Fed. 323, the United States Supreme Court overruled the demurrer to a petition for a writ of habeas corpus. One ground for this was that important evidence had been omitted from the record, so that a "full record" was not "preserved of the essentials on which the executive officials proceed to judgment". In that case at page 464, the Supreme Court said:

> "For failure to preserve such a record for the information, not less of the Commissioner of Immigration and of the Secretary of Labor than of the courts, the judgment in this case must be reversed."

To the same effect see also *In Re Can Pon*, 161 Fed. 618, 623, affirmed 168 Fed. 479.

For the foregoing reasons it is respectfully submitted that the order of the District Court must be reversed and the appellant discharged.

Respectfully submitted,

JOHN BEARDSLEY,
Attorney for Appellant.

No. 6072.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
ZUSMAN FIERSTIEN
For a Writ of Habeas Corpus.

Zusman Fierstien,
Appellant,

vs.

Walter E. Carr, District Director of District No. 31, United States Immigration Service, at Los Angeles,
Appellee.

APPELLEE'S BRIEF.

SAMUEL W. MCNABB,
United States Attorney.

P. V. DAVIS,
Assistant United States Attorney.

HARRY B. BLEE,
Immigration Service, on Brief.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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TABLE OF CASES AND AUTHORITIES CITED.

No. 6072.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
ZUSMAN FIERSTIEN
For a Writ of Habeas Corpus.

Zusman Fierstien,
Appellant,

vs.

Walter E. Carr, District Director of District No. 31, United States Immigration Service, at Los Angeles,
Appellee.

APPELLEE'S BRIEF.

PRELIMINARY STATEMENT.

This case is before this court on appeal from an order of the United States District Court in and for the Southern District of California, Central Division, discharging a writ of habeas corpus and remanding Zusman Fierstien to the custody of appellee for deportation in accordance with the warrant issued by the Secretary of Labor. The original Department of Labor, Bureau of Immigration Record No. 55648/889 has been filed heretofore and when occasion arises said record will be referred to as the "Bureau File."

STATEMENT OF THE CASE.

Zusman Fierstien, appellant herein, is an alien, to-wit, a native and subject of Russia and of the Hebrew race. He last entered the United States on or about July 30, 1920, at Niagara Falls, New York, without inspection under the immigration law of the United States and apparently has continued to reside in the United States since that time. On or about the 15th day of October, 1928, appellant was arrested by the so-called "Radical Section" of the Los Angeles, California, Police Department, as an alien anarchist. The matter was reported to appellee, who directed an investigation. This investigation was instituted on the 18th day of October, 1928, at which time appellant was represented by counsel, and at the conclusion of the preliminary hearing accorded at that time, the facts were submitted to the Secretary of Labor at Washington, D. C., who caused his warrant to be issued directing that appellant be taken into custody and given a hearing to show cause why he should not be deported from the United States. Appellant was taken into custody under said warrant and pending further proceedings was released under bond and still is at liberty under bond. A hearing was accorded appellant on the 5th day of November, 1928, under the warrant, and on the 13th day of November, 1928, the hearing was reopened and further testimony was taken. At each of these November hearings, appellant was represented by counsel. At the conclusion of the hearing counsel submitted a brief which was transmitted to the Department of Labor with the complete record in the case and on the 21st day of February, 1929, the Secretary of Labor

issued his warrant directing deportation of appellant to Russia on the ground that he had

> "been found in the United States in violation of the Immigration Act of October 16, 1918, as amended by the Act of June 5, 1920, in that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue or display, written or printed matter advising, advocating, or teaching the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States, or of any other organized government; that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays or causes to be written, circulated, distributed, printed, published or displayed or that has in its possession for the purpose of circulation, distribution, publication, issue or display, written or printed matter advising, advocating or teaching the unlawful damage, injury or destruction of property; and that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue or display, written or printed matter advising, advocating or teaching sabotage."

QUESTIONS AT ISSUE.

1. Was there sufficient evidence in the record to justify the order of deportation?

2. Was the appellant accorded a fair hearing?

Appellee contends that both of these questions must be answered in the affirmative.

ARGUMENT.

As to the First Question.

Reference to the grounds of deportation as set forth in detail in our statement of the case indicates that the appellant herein is not charged with being an anarchist, nor with openly advocating the unlawful killing of officers of the Government, nor is he accused of personally teaching the unlawful destruction of property, nor is he accused of sabotage. The charge is that he is a member of or affiliated with an organization, association, society, or group that teaches and advocates these things. It is necessary for appellee to show some evidence of appellant's membership in or affiliation with some such organization.

It is well settled that the Communist Party of America is an organization that entertains a belief in the overthrow by force or violence of the Government of the United States and teaches the overthrow by force or violence of all forms of law. (*Skeffington v. Katzeff* (C. C. A. 1st), 277 Fed. 129; *Antolich v. Paul* (C. C. A. 7th), 283 Fed. 957; *Unger v. Seaman* (C. C. A. 8th), 4 Fed. (2d) 80; *Ex parte Jurgans,* 17 Fed. (2d) (D. C.) 507.) On page 8 of the hearing of appellant on October 18, 1928, as it appears in the bureau file, Lieutenant Hynes of the Los Angeles Police Department testified that appellant stated on October 15, 1928, that he, appellant, was a member of the Communist Party. On page 9 of the same hearing, the immigrant inspector asked this question: "Now, in view of all these facts and evidence do you still, I will ask you again if you are a member

of the Communist Party." Appellant answered this question as follows: "Yes, I am a member of the Communist Party," adding that he first joined the party in New York in October, 1928. In his brief, on page 5, counsel points out that at the time of the hearing the Communist Party was functioning under the name of the Worker's Communist Party and since then the name has been changed to the "Communist Party of U. S. A." He also points out that in the earlier years the party was known as the Communist Labor Party and still later was known as the Worker's Party. Appellee contends that the particular name under which the organization functions is immaterial for appellant admits that at the time he joined the organization he subscribed to the program and statutes of the Communist International. He is therefore a believer in the doctrines and teachings of the Third International and of the Communist Party, and in view of that fact appellant is a member of an organization which advocates those things prohibited by the act approved October 16, 1918 (40 Stat. 1012), as amended by the act approved June 5, 1920 (41 Stat. 1008). As such member, under the cases above cited, he is subject to deportation.

Appellee contends that there was substantial and sufficient evidence to justify the order of deportation. It is well settled that the courts will not review the finding of the Secretary of Labor upon questions of fact involved if there is some substantial evidence to support it.

Ng. Fung Ho v. White, 259 U. S. 246;
Wong Nung v. Carr, 30 Fed. (2d) 766.

As to the Second Question.

Appellee contends that the hearing accorded appellant was fair and that appellant was deprived of none of his constitutional rights. The hearing throughout was conducted in accordance with the immigration law and the rules and regulations based thereon. At the hearings appellant was represented by counsel. The right of cross-examination was accorded Appellant. He was permitted to introduce testimony in his own behalf. He was fully advised of his legal rights and at the conclusion of the hearing counsel submitted his brief in behalf of appellant.

The evidence being sufficient to justify the order of deportation and the hearing which developed that evidence having been fairly conducted, appellee respectfully contends that this appeal should be dismissed.

REPLY TO APPELLANT'S BRIEF.

Counsel attacks the legality of the proceeding which resulted in the order of deportation on the following five grounds, and they will be discussed in the order in which they appear.

1. Counsel Alleges Appellant Was Not Given a Fair Hearing Before the Immigration Service and the Department of Labor.

Counsel refers to *Ungar v. Seaman,* 4 Fed. (2d) 80, which upholds the right of an alien to a fair hearing in deportation proceedings and sets forth four elements which must exist before the hearing is fair. They are as follows:

a. A definite charge with opportunity for the alien to read same.

b. Right of counsel.

c. Right to cross-examine.

d. Only competent evidence to be used.

It is appellee's contention that in the case at bar all of the above requirements have been met.

Counsel refers to the use of the alternative "or" in the warrant of deportation and contends that the grounds for deportation are therefore not definite. We will discuss this feature later in this brief.

Under this subdivision counsel stresses the fact that appellant was denied the right to cross-examine Inspector Del Guercio, who conducted the hearing, as indicated by page 14 of transcript of hearing of November 5, 1928, as it appears in the bureau file. Reference to that file indicates that counsel had conducted a lengthy cross-examination of the Government's witness, Police Lieutenant Hynes, and that the question as to who had arrested appellant had been discussed at great length. During the cross-examination of Lieutenant Hynes and in the discussion that arose incident to such cross-examination, counsel turned to Inspector Del Guercio and stated to the inspector, "I want to ask you a question now." As far as the deportation proceeding is concerned the question as to who had originally taken appellant into custody is of slight importance, for the record shows that appellant, at the time of the hearing on November 5, 1928, was in the custody of the Immigration Service under departmental warrant of arrest dated October 20, 1929. The refusal of the examining inspector to give testimony on the question of appellant's arrest was immaterial to

the question at issue, which was the right of appellant to remain in the United States. The further charge that Inspector Del Guercio participated in the arrest of the alien and was present at, if he did not participate in "the seizure of the alien's possessions without a search warrant" is also believed by appellee immaterial when it appears that the exhibits seized were not considered by the Secretary of Labor when reaching his decision in the case, and when it further appears that the examining inspector did not in fact have anything to do with the seizure of the exhibits in question.

On page 10 of his brief, counsel alleges that the Board of Review claimed it had disregarded the exhibits in question, yet referred to it in support of its conclusion as to the nature of the Communist Party. We will refer in detail to this point elsewhere in this brief.

2. Counsel Alleges Evidence Was Used Against Appellant Which Had Been Taken From His Possessions Illegally.

On pages 1 and 2 of the report of the Board of Review under date of February 14, 1929, which report appears in the bureau file, will be found listed some 23 exhibits found by the police officers at the time appellant was taken into custody. It is the contention of appellee that the exhibits referred to did not come unlawfully into the possession of the Immigration Service. The police officer in this case made the arrest without a warrant upon a belief reasonably entertained by him that the appellant had committed a felony. As an incident of this arrest the police officer had the right to search, not only the person of the accused, but the room and immediate premises wherein he

was found. Such is the law not only of the state of California, but also of the United States.

Penal Code of California, Sec. 836 et seq.;
Agnello v. U. S., 269 U. S. 20;
Moron v. U. S., 275 U. S. 192.

But aside from the question of the legality of the seizure of the exhibits complained of it will be noted, by reference to the report of the Board of Review dated February 14, 1929, heretofore referred to, that the exhibits were discarded by the Board of Review and were not relied upon by it in reaching its decision. The reason for not considering the exhibits as evidence was because counsel objected throughout the hearing to their use because he claimed they were improperly in the possession of the Immigration Service. For the reasons above cited counsel is of the opinion that this second ground of objection is untenable.

3. Counsel Contends the Evidence Was Not Sufficient to Sustain the Charges Made and the Issuance of the Warrant of Deportation.

Appellant is a Communist and, as pointed out heretofore, he subscribed to the manifesto of the Communist International, thus declaring his adherence to the purposes and tactics of the Communist International and is bound by it. While the appellant denies that he believes in violence and states that any reformation and change should be brought about by educating the masses rather than by revolutionary tactics, yet the principles of the Communist Party and Communist International are well known and the high-sounding phrases and expressions used by

adherents to the policies of the Communist International cannot be relied upon entirely to indicate the true purpose of the organization. As set forth by Judge Geiger's quoted opinion on page 959 in the case of *Antolich v. Paul* decision, *supra:*

> "We are brought to a consideration, not as a mere matter of lexicolography of words used by the Communist Party and its adherents in their oral and written utterances, but rather to the understanding in the minds of those who receive them. . . ."

On page 3 of the report of February 14, 1921, submitted in the case by the Board of Review, which report is incorporated in the bureau file, the following appears:

> "the evidence is quite sufficient to show that, regardless of the name of the organization to which the alien belongs, and as shown by his receipt for membership, said organization is affiliated with the Communist Party, is governed by the orders or instructions of the Third International, and that party, while having candidates in the field in open and legal manner, has for its object the overthrow of the Government of the United States as it is now established, and the evidence is also sufficient to indicate that the party will not fail to use any means which may bring this about. . . . It is noted that the alien's attorney refers to the alien constantly as a Communist, and that the alien admits membership in the Worker's Communist Party of America and that his party must carry out the orders received from its superiors, the Third International of the Communist Party. While the alien refers to his own attitude as that of one who desires to proceed by orderly and legal means to obtain certain objectives, there is no showing that his party was organized for such a purpose, and in view of the fact that his party, under the direction of the Third International, does, and under orders must, advocate those things prohibited by the Immigration

> Act to an alien, and as the subject of these proceedings is an alien, *it is found that the charges are sustained.* . . . (Italics ours.)

Reference to the finding of the examining inspector as it appears on page 29, reopened hearing to show cause, dated November 13, 1928, incorporated in the bureau file, indicates that the examining inspector found five separate grounds upon which, in his opinion, a warrant of deportation should be based. Briefly stated, these grounds are that

1. Appellant is a member of an organization advocating the assaulting or killing of public officers.
2. That he is a member of an organization which advocates unlawful destruction of property.
3. That he is a member of an organization which advocates sabotage.
4. That he is a member of an organization which is opposed to all organized government.
5. That he is a member of an organization which teaches the overthrow by force or violence of the Government of the United States or of all forms of law.

As pointed out above, the Board of Review found that these charges were sustained. It appears, however, that in issuing the formal warrant of deportation the two charges last mentioned were not incorporated in said warrant. It is believed, however, that this should not justify cancellation of the proceedings. The Communist Party believes in and advocates the proscribed tactics covered by the five grounds for deportation included in the finding of the examining inspector. The Communist In-

ternational teaches those unlawful beliefs and practices. Appellee has subscribed to those principles and the mere fact that two of the grounds did not appear in the formal warrant of deportation should not, in the opinion of the appellee, justify cancellation of the warrant of deportation when it appears that appellant had notice of all five of said charges and was given opportunity to meet them.

4. Counsel Contends That the Findings Upon Which the Warrant of Deportation Was Based Are in the Alternative and Therefore No Findings at All.

Unquestionably it would have been better if the charge had not been stated in the alternative. The fact that the charge was so stated in appellee's opinion does not invalidate the proceeding. In *Kostenowczyk v. Nagle* (C. C. A. 9th), 18 Fed. (2) 834, as in the case at bar the warrant of deportation was stated in the alternative form following the length of the statute. This Honorable Court held with reference to that case:

> "Appellant has not been injured, for the warrant of arrest for deportation of an alien need not have the formality and particularity of an indictment, but is sufficient if it gives defendant adequate information of the act that brings him within the excluded classes and to enable him to offer testimony to refute the same at a hearing."

It appears in the case at bar, however, that there was no uncertainty on the part of counsel as to whether appellant was charged with being a member of a proscribed organization or whether he was charged with simply being affiliated with such organization. Reference to page 11 of

counsel's brief indicates their knowledge of the specific charge urged against appellant, for counsel says:

> "The court will observe that the warrant of deportation is based upon findings which boil down to this: that the alien is a member of an organization which advocates the unlawful assault or killing of any officers and which advocates the unlawful damage or injury or destruction of property, or which advocates sabotage."

Throughout the hearing the record shows that appellant was charged with being a member of a proscribed organization and counsel and appellant knew that was the charge. The fact that counsel made an attempt to show that the Worker's Communist Party, of which appellant was a *member*, was a legitimate political organization with presidential and vice-presidential nominees regularly appearing on the ballot in some 34 states of the Union, indicates that counsel and appellant were clear on this point and were not misled by the statement of the charge in the alternative.

5. Counsel Contends That the Record Before the Court Is Admittedly Incomplete, Since None of the Exhibits Received at the Hearing as Shown by the Record Is Included in the Record.

It is true that the exhibits in this case as listed on pages 1 and 2 of the finding of the Board of Review, dated February 14, 1929, were admitted in evidence by the examining inspector and were transmitted to the Secretary of Labor with the record in the case. The introduction of these various exhibits was objected to by counsel on the ground that they had been improperly secured. While not conceding that valid objection could have been inter-

posed against the use of these various exhibits, yet, because of the question on that point raised by counsel for petitioner, the Board of Review did not consider the exhibits in question as evidence and reached its decision on evidence aside from that contained in those exhibits. It is true that the Board of Review report refers to the exhibits as "inflammatory" in their nature, tending to stir up class hatred and such as may be expected to lead to the unlawful destruction or the assaulting of Government officers because of their official status. But the exhibits were nevertheless disregarded as evidence, as indicated by the board's finding of February 14, 1929, from which we quote.

> "It is found that the charges are sustained, regardless of the use, or failure to use, any of the documentary evidence to the introduction of which the alien and his attorney objected."

Counsel contends that although the exhibits were improperly admitted in evidence they were improperly discarded so that in the record which is now before the court was not preserved "the essentials on which the executive officers proceed to judgment." In this connection he refers to the cases of *Qwock Jan Fat v. White,* 253 U. S. 454, and *In re Can Pon,* 168 Fed. 479. In the Qwock Jan Fat case the report indicates that a Chinese person by that name was denied admission at San Francisco and that the record upon which the denial was made contained a report of an inspector embodied in which report was information given the inspector by an undisclosed witness. It appears that counsel for Kwock Jan Fat requested to see the testimony of the undisclosed witness and was informed that no affidavit or *verbatim* report of the testi-

mony given by the witness had been secured. The inspector's report which contained the information furnished by this undisclosed witness was made a part of the record and notation was entered in the record to the effect that the inspector's report had in no way influenced the action of the commissioner in denying Kwock Jan Fat admission to the United States. In reversing the Circuit Court of Appeals and ordering a writ of habeas corpus to issue, the Supreme Court of the United States held that it was within the province of courts in proceedings for review to prevent abuse of the extraordinary power conferred upon the Secretary of Labor and that in reviewing cases of the character mentioned, the court should have before it a full record upon which the executive officers based their findings. In the case of *In re Can Pon, supra*, the immigration authorities failed, through inadvertence or otherwise, to include in the record certain testimony taken on the hearing, which testimony had a bearing upon the question of Can Pon's citizenship. A portion of the omitted testimony contained direct evidence to the effect that Can Pon had been born in the United States and the court held that Can Pon was entitled to the benefits of such testimony and failure of the immigration authorities to include the testimony in question was a substantial denial of the rights of Can Pon.

In each of the above cases the omitted testimony unquestionably was favorable to the Chinese involved. In other words, the omitted testimony tended to show that they were entitled to admission to the United States. In the instant case the exhibits, if they had been considered in evidence by the Board of Review, might have militated

against appellant. We can conceive of no reason why counsel at the preliminary hearing and in the subsequent hearings should have objected so strenuously to the department considering these exhibits if anything therein contained might have benefited the appellant. The sole purpose for objecting to the introduction of the exhibits seems to have been on the theory that they had been improperly secured and that appellant would be injured thereby. While the Board of Review may not delete evidence from the record favorable to the alien, yet there seems no good reason why the board may not disregard testimony detrimental to the alien when it appears such testimony was improperly incorporated in the record by the examining inspector. In this connection we refer to the case of *Caranica v. Nagle,* decided by the Circuit Court of Appeals in this the 9th Circuit on January 9, 1928, and reported in 23 Fed. (2nd) 545. In that case the appellant's counsel did not cross-examine certain witnesses. Of its own motion the Board of Review postponed further hearing in the matter until the witnesses could be presented for cross-examination. On a subsequent hearing it was shown that the witnesses could not be found. Owing to the fact that the appellant had not been able to cross-examine the witnesses in question, the Board of Review in its recommendation said:

> "These persons were not presented for the purpose of cross-examination, and objection of counsel was therefore well taken, and the statements have not been considered."

By its decision the court held that the hearing was not unfair in view of the fact that the Board of Review on its own recommendation had not considered the testimony

previously given which was adverse to the alien's interest. This decision recognizes the right of the Board of Review to disregard testimony and evidence in certain instances, and appellee respectfully submits that the action of the board in the case at bar was in line with the principle enumerated in Caranica v. Nagle, and should not be considered justification for appellant's release under the writ.

Conclusion.

For the reasons above set forth appellee believes:

1. That there is sufficient evidence in the record to justify the deportation.

2. That the appellant was accorded a fair hearing.

Respectfully submitted,

SAMUEL W. MCNABB,
United States Attorney.
P. V. DAVIS,
Assistant United States Attorney.
HARRY B. BLEE,
Immigration Service, on Brief.

No. 6072.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of the Petition of Zusman Fierstein for a Writ of Habeas Corpus.

Zusman Fierstein,
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Appellee.

APPELLEE'S PETITION FOR REHEARING.

SAMUEL W. MCNABB,
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APPELLEE'S PETITION FOR REHEARING.

And now comes Joseph A. Conaty, Acting District Director of the Immigration Service of the United States Department of Labor in and for the Los Angeles, California, District, appellee herein, and respectfully petitions this court for a rehearing of the above cause and that upon a reconsideration of the law and the facts involved in this matter, this court modify its decision and directions to the trial court and make the same more specific by ordering and directing that the issues involved herein be tried *de novo* by the Secretary of Labor and his assist-

ants as provided and suggested in the case of *Tod v. Waldman,* 266 U. S. 113, 120, 69 L. Ed. 195, 45 S. C. 85 (on rehearing: 266 U. S. 574, 45 L. Ed. 193), on the following grounds:

The judgment of the court in the instant case is that the same be "Reversed, with directions to try the issues *de novo* as suggested in Chin Wow v. United States, 208 Fed. 131; Whitfield v. Hanges, 222 Fed. 745; Svarney v. United States, 7 Fed. (2d) 515; Mouratis v. Nagle, 24 Fed. (2d) 799; *In re* Chan Foo Lin, 243 Fed. 137; Ungar v. Seaman, 4 Fed. (2d) 81; Ng Fung Ho, 259 U. S. 276."

We have examined the above citations with considerable care and we believe that they involve in some instances facts and circumstances quite different from those in this case, and in our opinion the decision of this court should be amplified and made more definite and specific so as to show whether it is the judgment of this court that the merits of the case be tried *de novo* by the District Court or by the Department of Labor, Immigration Service. The cases cited by this court as authority for its conclusion do not seem to make it clear as to what proceedings should be taken in the District Court.

The case of *Chin Yow v. United States,* 208 U. S. 13 (erroneously printed in the opinion as 208 Fed. 13), related to a Chinese person, claiming to be a citizen of the United States. The Supreme Court stated that

> "The courts must deal with the matter somehow and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship a longer restraint would be illegal. If he fails, the order of deportation would remain in force."

As we understand it, the effect of the Chin Yow and the *Ng Fung Ho v. White* (259 U. S. 276, 285) cases is that one presenting a substantial claim of being a citizen of the United States is entitled to a judicial determination of that question, for the reason that the jurisdiction of the Immigration Department is limited to aliens and therefore the question of citizenship is a jurisdictional question. In the Ng Fung Ho case, the Supreme Court reversed the judgment of the Circuit Court of Appeals of the Ninth Circuit and remanded the cause to the District Court for trial in that court on the question of citizenship and for further proceedings in conformity with the opinion of the Supreme Court as therein expressed.

The case of *Whitfield v. Hanges,* 222 Fed. 745, decided by the Eighth Circuit, involved certain citizens of Greece who were ordered deported. The District Court ordered in the habeas corpus proceeding that the aliens be discharged without prejudice to the right of the Bureau of Immigration to proceed against them in a lawful manner to prove, if it could do so, the grounds alleged in the warrant of arrest. The Circuit Court held that

> "The practice approved by the Supreme Court and generally prevailing, however, seems to be that the court which takes jurisdiction and custody of the alien under the writ of habeas corpus and finds that his hearing has been unfair retains custody and jurisdiction of him and of the case, and tries on the merits *de novo* on evidence introduced before that court the question whether or not the alien is guilty of the charges made against him in the warrant of arrest before making his discharge absolute."

The case of *Svarney v. U. S.*, 7 Fed. (2d) 515, involved a Greek subject, and, in passing upon the case, the Circuit Court of Appeals of the Eighth Circuit stated, after an analysis of the evidence, that their conclusion was that there was no substantial evidence in the record to support the findings in the warrant for deportation and reversed the judgment of the District Court

> "with directions to try on the merits *de novo* in the District Court, on evidence there to be produced, the question whether or not the alien is guilty of the charges made against him in the warrant of arrest in accordance with the practice outlined in Whitfield v. Hanges, 222 Fed. 745."

Mouratis v. Nagle, 24 Fed. (2d) 799, also involved an alien of the Greek race, and this court reversed the District Court with directions to try the issues *de novo* as suggested in the Chin Yow, Hanges and Svarney cases, *supra.*

The case of *Chan Foo Lin,* 243 Fed. 137, decided by the Sixth Circuit, involved a Chinese person who claimed to be a citizen of the United States, and the cause was remanded to the court below with directions to so modify the order from which the appeal was taken as to retain jurisdiction and custody of the petitioner subject to bail and to hear and determine the case on its merits *de novo,* the court further stating that it was more content to adopt this course since a question of citizenship is involved, citing the Chin Yow case and the case of *U. S. v. Petkos,* 214 Fed. 978, and *Ex parte Chin Loy* (D. C.), 223 Fed. 833.

Ungar v. Seaman, 4 Fed. (2d) 81, decided by the Eighth Circuit, held that the cases there involved must

be remanded to the lower court to hear *de novo* and determine the same on their merits, citing the Whitfield and Chan Foo Lin cases.

In the Chan Foo Lin case, *supra,* the court cited the case of *United States v. Petkos,* 214 Fed. 978, but the court in the Petkos case held that the court had power to make its order of discharge in habeas corpus proceedings

> "conditional, and to be effective only in case those officers (referring to the immigration officers) should fail to give the alien a fair hearing on lawful evidence required by the Immigration Act within a reasonable time. We think this course should have been adopted as and when best calculated to secure proper administration of the legislative provisions applicable."

It seems, therefore, that under the Petkos case, the better way of disposing of the matter is to remand the case to the District Court with directions to that court to modify its order already entered so as to make the decision in the habeas corpus proceedings conditional to the effect that in case the immigration officers shall fail within a reasonable time to give the petitioner a full and fair hearing, then and in that event, the petitioner shall be discharged.

This court in the case of *White v. Wong Quen Luck,* 243 Fed. 547, in dealing with a Chinese person born in China but claiming to be the son of a native of the United States, held that the lower court in ordering the unconditional release of the applicant went further than it should have and that the order of discharge should not have been final but conditional, to be effective only in case the immigration authorities should fail to give applicant the fair

hearing required by law "within a reasonable period, say thirty days hereafter," citing the Petkos case.

Although the last referred to case was decided about seven years before the Tod.case was decided by the Supreme Court, the procedure adopted was practically the same as that ordered in the Tod case, and we feel that the same procedure should be adopted here and that the decision of this court should be so modified or amplified as to follow that procedure.

In the Tod v. Waldman case, the Supreme Court in discussing this subject (266 U. S. 119), through Chief Justice Taft said:

> "Counsel for the Government urge that under three decisions of this court, Chin Yow v. United States, 208 U. S. 8, 13; Kwock Jan Fat v. White, 253 U. S. 454, and Ng Fung Ho v. White, 259 U. S. 276, the question with respect to which the petitioners have not been given a fair hearing should now be remanded to the District Court for its decision. Without saying that the circumstances might not arise which would justify such a variation in the order from that which we now direct, we do not think that the course taken in the cases cited should guide us here. In those cases the single question was whether the petitioner was a citizen of the United States before he sought admission, a question of frequent judicial inquiry. Here the questions are technical ones involving the educational qualifications of an immigrant in a language foreign to ours, and the medical inquiry as to effect of a physical defect on the probability of a child's being able to earn a living or of becoming a public charge. The court is not as well qualified in such cases to consider and decide the issues as the immigration authorities. The statute intends that such questions shall be considered and determined by the immigration authorities. It would seem better to remand the relators to the hearing of

> the appeal, by the Secretary and his assistants, who have constant practice and are better advised in deciding such questions."

None of the cases cited by this court in support of its decision herein make any reference to the opinion of the Supreme Court in the Tod case which was decided on November 17th, 1924, although three of them were decided subsequently thereto: the Svarney case having been decided less than nine months subsequently to the Tod case; the Mouratis case having been decided by this circuit a little more than three years subsequently to the Tod case, and the Ungar case having been decided one month subsequently to the Tod case.

We do not understand why the Tod case was not considered or referred to in the said cases decided after the decision of the Supreme Court in that case, but it might be that the court's attention was not directed thereto or it was thought that the opinion in the Tod case had no application to the facts in the other cases. In this connection, however, we wish to say that while there appears to be no conflict between the decision of the Supreme Court in the Tod case and that of the same court in the Chin Yow and the Ng Fung Ho cases, the Supreme Court states in the Tod case that it does not think that the course taken in the Chin Yow, Kwock Jan Fat and Ng Fung Ho cases should guide the court in the Tod case and construes the decisions in those cases as involving the single question of whether the petitioners therein were citizens of the United States before they sought admission.

The question of citizenship, however, is not involved in the instant case, and we respectfully submit that, ac-

cording to our understanding of the opinion of the Supreme Court in the Tod case, the proper course to pursue is that outlined therein rather than that outlined in the cases cited by this court in its opinion in the case at bar.

In the Tod case, the Supreme Court cites the case of *Mahler v. Eby,* 264 U. S. 32, 46, in which latter case the court held that the warrant of deportation lacked the finding required by the statute and reversed the judgment of the District Court,

> "with directions not to discharge the petitioners until the Secretary of Labor shall have reasonable time in which to correct and perfect his finding on the evidence produced at the original hearing, if he finds it adequate, or to initiate another proceeding against them."

The opinions in both the Mahler and Tod cases were written by Chief Justice Taft and we wish to adopt the language of that great jurist in the Tod case wherein it is said:

> "The court is not as well qualified in such cases to consider and decide the issues as the immigration authorities. The statute intends that such questions shall be considered and determined by the immigration authorities. It would seem better to remand the relators to the hearing of the appeal by the Secretary and his assistants who have constant practice and are better advised in deciding such questions."

Adapting and applying the last above quoted words of Chief Justice Taft to the law and facts involved herein, we take the liberty to suggest to this court and request that this case be remanded with directions that the issues involved be tried *de novo* and determined by the Depart-

ment of Labor, Immigration Service, rather than by the District Court.

See also:

Camardo v. Tillinghast, 29 Fed. (2d) 527, 529 (1st Circuit);

U. S. v. Husband, 6 Fed. (2d) 957 (2nd Circuit).

In the last cited case, the court said:

> "The lower court was entitled and required to pass upon the legality of what the Executive Department had done, and that was also the limit of its duty. It was error to hold what was a hearing on new evidence as to certain of the facts."

In *Bieloscycka's Case,* 3 Fed. (2d) 551 (2nd Circuit), in dealing with a situation somewhat similar to the one shown herein, the court said:

> "In other words, the District Court, instead of ascertaining what the Department of Labor had done, and declaring whether or not by so doing the department had exceeded its jurisdiction, held substantially the same kind of a hearing that ought to have been had, and which in point of fact had been held, by the board of special inquiry. This practice is strongly disapproved. It is substantially a usurpation by the courts of those duties of investigation and fact ascertainment which the statute imposes on the Department of Labor. The court below had no right to conduct what was substantially an original investigation; its function was to investigate what the Department of Labor produced as the result of its own investigation."

Our request that the instant case be remanded with directions that a full and fair hearing be had before the Department of Immigration is, we believe, wholly in

accord with the decision of the Second Circuit in the case of *United States v. Day,* 20 Fed. (2d) 302, wherein it was said:

> "The detention was therefore unlawful, and the writ should have been allowed. However, this does not involve the release of the relator. The proper procedure is to remit him to the custody of the Commissioner, who should then give him a hearing before a duly detailed immigration inspector. Tod v. Waldman, 266 U. S. 113, 45 S. Ct. 85, 69 L. Ed. 195."

Respectfully submitted,

SAMUEL W. MCNABB,
United States Attorney.

P. V. DAVIS,
Assistant United States Attorney.

HARRY B. BLEE,
U. S. Immigration Service
On the Petition.

No. 6073

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH HAYDEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6073

United States
Circuit Court of Appeals
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JOSEPH HAYDEN,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF COUNSEL.

Messrs. LONG & HAMMER, Attorneys for Appellant,
660 Central Bldg., Seattle, Washington.

Messrs. ANTHONY SAVAGE and TOM DeWOLFE, Attorneys for Appellee,
310 Federal Building, Seattle, Washington.

[1*]

United States District Court, Western District of Washington, Northern Division.

No. 20,083.

JOSEPH HAYDEN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT.

The plaintiff complains of the defendant and for his cause of action alleges:

I.

That the plaintiff is a resident of the above-named judicial district of the United States, to wit, the Western District of Washington, Northern Division.

*Page-number appearing at the foot of page of original certified Transcript of Record.

II.

That on or about the 19th day of September, 1917, plaintiff was inducted into the military service of the United States of America at Seattle, Washington, and served in Company "H" of the 361st Infantry, and in Company "C" of the 58th Infantry, and was honorably discharged from the army at Camp Lewis, Washington, on or about the 6th day of June, 1919. That on or about the 3d day of December, 1917, he applied for and was issued a policy of war risk insurance in the sum of $10,000.00, said certificate being numbered 959377, and that thereafter there was deducted from his monthly pay the premium for said insurance. By the terms of said certificate, the defendant agreed to pay the plaintiff the sum of $57.50 per month in the event of suffering total and permanent disability. [2] Plaintiff paid the premiums on said insurance until August 2, 1919.

III.

That while plaintiff was in the said military service, and while the said insurance was in full force and effect, plaintiff became totally and permanently disabled from following any substantially gainful occupation on account of injuries received in line of duty; that on or about the 20th day of July, 1918, he was gassed; that on or about the 5th day of October, 1918, he was wounded by a high explosive shell; that at all times since said dates plaintiff has suffered on account of the aforesaid injuries and disabilities. Plaintiff has been informed and believes, and therefore alleges as true

that the aforesaid injuries and disabilities are permanent in their nature, and that he will never recover therefrom. That by reason of the foregoing, plaintiff became totally and permanently disabled from following any substantially gainful occupation and has been informed and believes, and therefore alleges as true that he will always be so disabled, and will never again be able to follow any substantially gainful occupation. By reason whereof, plaintiff became entitled to receive from the defendant the sum of $57.50 per month from and after October 5, 1918.

IV.

That plaintiff has made due proof of said disabilities and demanded the aforesaid payments, but that the defendant has disagreed with him as to his claim and disabilities, and has refused to pay the same, or any part thereof.

WHEREFORE, plaintiff prays judgment against the defendant [3] in the sum of $57.50 per month, commencing from the 5th day of October, 1918, until the date of rendition of verdict in this case, together with his costs and disbursements herein.

PAUL, LONG & CARLSON,
Attorneys for Plaintiff.

Office and Postoffice Address:
660 Central Building,
Seattle, Washington. [4]

State of Washington,
County of King,—ss.

Joseph Hayden, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled action, that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

JOSEPH HAYDEN.

Subscribed and sworn to before me this 6th day of May, 1929.

WM. G. LONG,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed May 7, 1929. [5]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant in the above-entitled matter, by Anthony Savage, United States Attorney for the Western District of Washington, and Jeffrey Heiman, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney for the United States Veterans' Bureau, and for answer to the bill of complaint of plaintiff herein admits, denies and alleges as follows, to wit:

I.

For answer to paragraph I of plaintiff's complaint, defendant has not sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations therein contained, and, therefore, denies the same.

II.

For answer to paragraph II of plaintiff's complaint, defendant admits that on September 19, 1917, the plaintiff entered the military service of the United States and that he was honorably discharged therefrom on June 6, 1919. It is further admitted that on December 3, 1917, the plaintiff applied for and was granted war risk insurance in the amount of Ten Thousand ($10,000.00) Dollars, but denies each, every and singular the remaining allegations [6] in said paragraph contained.

III.

For answer to paragraph III of plaintiff's complaint, defendant denies each, every and singular the allegations therein contained.

IV.

For answer to paragraph IV of plaintiff's complaint, defendant admits that a disagreement exists between plaintiff and defendant, but denies each, every and singular the remaining allegations in said paragraph contained.

For a further answer and by way of a First Affirmative Defense, defendant doth allege:

I.

That on September 19, 1917, plaintiff enlisted in the United States Army and was honorably discharged therefrom on June 6, 1919; that on December 3, 1917, he applied for and was granted War Risk Insurance in the amount of Ten Thousand ($10,000.00) Dollars payable in monthly installments of $57.50 each in the event of his death or permanent and total disability occurring while the contract was in force and effect; that premiums were paid on this insurance contract, which is the insurance contract sued upon, to include the month of June, 1919, and that said insurance contract lapsed for the nonpayment of the premium due July 1, 1919, and was not in force and effect thereafter.

WHEREFORE, having fully answered the complaint of the plaintiff herein, defendant prays that the same be dismissed with prejudice, and that the defendant may go hence [7] with its costs and disbursements herein to be taxed according to law.

ANTHONY SAVAGE,
United States Attorney.
JEFFREY HEIMAN,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans' Bureau.

United States of America,
Western District of Washington,
Northern Division,—ss.

Jeffrey Heiman, being first duly sworn, on oath

deposes and says: That he is Assistant United States Attorney for the Western District of Washington, Northern Division, and as such makes this affidavit on behalf of the defendant herein; that he has read the foregoing Answer and First Affirmative Defense, knows the contents thereof, and believes the same to be true.

JEFFREY HEIMAN.

Subscribed and sworn to before me this 3d day of August, 1929.

[Seal] T. W. EGGER,
Deputy Clerk, U. S. District Court, Western District of Washington.

Received a copy of the within answer this 2 day of Aug., 1929.

S. F. CHADWICK,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 3, 1929. [8]

[Title of Court and Cause.]

REPLY.

Comes now the plaintiff and replying to the further answer and first affirmative defense of the defendant, denies that said insurance contract lapsed for nonpayment of premium as alleged, or at all, and denies that the said contract was not in force or effect at the time alleged, or at all, and further denies each and every allegation in said affirmative

defense contained, except and only as to such allegations as may be specifically admitted in plaintiff's complaint herein.

PAUL, LONG & CARLSON,
Attorneys for Plaintiff. [9]

State of Washington,
County of King,—ss.

Joseph Hayden, being first duly sworn, on oath deposes and says: That he is the plaintiff in the within entitled action; that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

JOSEPH HAYDEN.

Subscribed and sworn to before me this 8th day of August, 1929.

WM. G. LONG,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within Reply this 9 day of Aug., 1929.

ANTHONY SAVAGE,
Attorney for Deft.

[Endorsed]: Filed Aug. 9, 1929. [10]

[Title of Court and Cause.]

NOTICE OF PRESENTATION OF JUDGMENT.

To Joseph Hayden, Plaintiff, and to Paul, Long & Carlson, Attorneys for Plaintiff:

You, and each of you, will please take notice that judgment in the above-entitled case, copy of which is hereto attached, will be presented to the above-entitled court for signature on Monday, the 18th day of November, 1929, at which time you may be present if you so desire.

Dated this 13th day of November, 1929.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, United States Veterans' Bureau.

Received a copy of the within notice this 13 day of Nov., 1929.

PAUL, LONG & CARLSON,
Attorneys for Pltff.

[Endorsed]: Nov. 18, 1929. [11]

United States District Court, Western District of Washington, Northern Division.

No. 20,083.

JOSEPH HAYDEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

This matter having come duly and regularly before the above-entitled court on October 17th, 1929, for trial, the jury having been impaneled and the plaintiff having been represented by Paul, Long & Carlson, and the defendant having been represented by Anthony Savage, United States Attorney, Tom DeWolfe, Assistant United States Attorney for the Western District of Washington, and Lester E. Pope, Regional Attorney for the United States Veterans' Bureau, and the plaintiff having adduced its evidence, and the plaintiff having rested, and the defendant having moved for a nonsuit on the grounds that the pleadings failed to make a *prima facie* case, evidence legally insufficient to sustain a verdict, and the defendant's motion having been granted, and the Court being advised in the premises,—

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the

above-entitled action, be, and the same is, hereby dismissed without prejudice, and that the defendant do have and recover of and from the plaintiff herein its costs and disbursements to be taxed according to law.

Done in open court this 18 day of November, 1929.

BOURQUIN,
United States District Judge. [12]

Received a copy of the within judgment this 13 day of Nov., 1929.

PAUL, LONG & CARLSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 18, 1929. [13]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO AND INCLUDING JANUARY 16, 1930, FOR LODGING PROPOSED BILL OF EXCEPTIONS AND EXTENDING TERM OF COURT.

IT IS HEREBY STIPULATED by and between the parties in the above-entitled action, through their respective attorneys, that the plaintiff herein may have up to and including the 16th day of January, 1930, within which to lodge his proposed bill of exceptions in the above-entitled matter, and

IT IS FURTHER STIPULATED that the present term of court may be deemed to be extended for

that purpose, and for all purposes connected with appeal in the above-entitled cause, and

IT IS FURTHER STIPULATED that the time for preparing, certifying and filing the record on appeal with the Circuit Court of Appeals be extended for a period of thirty (30) days from the date the bill of exceptions is allowed.

Dated at Seattle, Washington, this 25 day of October, 1929.

PAUL, LONG & CARLSON,
Attorneys for Plaintiff.
ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, United States Veterans' Bureau.

[Endorsed]: Filed Oct. 25, 1929. [14]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING JANUARY 16, 1930, FOR LODGING BILL OF EXCEPTIONS AND EXTENDING TERM OF COURT.

This matter having come on duly and regularly before the above-entitled court for hearing upon the application of the plaintiff herein for an order extending the time within which to lodge his proposed bill of exceptions herein, and it appearing to the

Court that both parties in the above-entitled action, through their respective attorneys, have stipulated that the plaintiff herein may have up to and including the first day of Dec., 1929, in which to lodge his proposed bill of exceptions in the above-entitled matter, and that the present term of court may be deemed extended for that purpose, and for all purposes connected with appeal in the above-entitled cause, and further that the time for preparing, certifying and filing the record on appeal with the Circuit Court of Appeals be extended for a period of thirty (30) days from the date the bill of exceptions is allowed, provided immediately brought on for settlement.

IT IS HEREBY ORDERED, that the plaintiff in the above-entitled action may have up to and including the 16th day of January, 1930, in which to lodge his proposed bill of exceptions in the above-entitled matter, and that the present term of court may be deemed extended for that purpose, and for all purposes connected with appeal in the above-entitled cause, and that the time for preparing, certifying and filing the record on appeal with the Circuit Court of Appeals be extended [15] for a period of thirty (30) days from the date the bill of exceptions is allowed as aforesaid.

This 25th day of October, 1929.

BOURQUIN,
Judge.

Presented by
ARVILLE H. MILLS.

[Endorsed]: Filed Oct. 25, 1929. [16]

[Title of Court and Cause.]

PLAINTIFF'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 17th day of October, 1929, at the hour of 3:00 o'clock P. M. the above-entitled and numbered cause came on regularly for trial before the Honorable George M. Bourquin, one of the Judges of the United States District Court, sitting in the above-entitled court at Seattle, in the Western District of Washington.

Wm. G. Long, appearing as counsel for the plaintiff, and Anthony Savage, United States Attorney, Tom DeWolfe, Assistant United States Attorney, and Lester Pope, Regional Attorney for the United States Veterans' Bureau, representing the defendant.

WHEREUPON the following proceedings were had:

A jury was duly empaneled and sworn to try this case, and Wm. G. Long made an opening statement to the jury. The defendant reserved its opening statement. [17]

TESTIMONY OF DR. STEWART V. R. HOOKER, FOR PLAINTIFF.

Doctor STEWART V. R. HOOKER, a witness called on behalf of the plaintiff, being duly sworn, testified on

Direct Examination.

My name is Stewart R. V. Hooker. My occupation is physician and surgeon in Seattle. I have practiced here almost twenty-four years. I am licensed to practice in the State of Washington. I graduated from Harvard. Boston Medical School. Was interne for a year; resident surgeon at the relief station for Boston a year and a half, and since then practicing in this state. I made a thorough examination of the plaintiff in the last few days. I found him suffering from transverse myelitis, which means a lesion of the spinal cord, which more or less paralyzes some muscles and some sensations below the point of lesion. This piece of shell entered the back about the level of the second lumbar vertebra, and evidently destroyed more or less of the nerve tissues. He is unable to walk well. He drags his left foot. There is an area of hypersensitiveness above the lesion, as we usually find in these cases. There is the typical sensation that we find in these cases,—something pulling,—there is a loss of sensation to pin pricks, which is practically total in the right thigh, and a loss of ability to distinguish between heat and cold in the entire right leg and thigh. The left leg can per-

(Testimony of Dr. Stewart V. R. Hooker.)

ceive these different sensations between heat and cold very much better, but in the left leg there is more disability. In the left leg the muscles are more paralyzed. There is the loss of ability to use the left leg. The reflexes, known as knee jerks, are a little increased on both sides. The left is much more increased than the right. The knees, feet, the plantar reflexes, which we get by stroking the sole of the foot, is increased, and there is the Babinsky reaction, which means that the big toe turns up instead of down while the sole is stroked. There is an inch and a quarter difference in the size of the [18] thighs, the left one being smaller than the right. This is because of the paralysis of the muscles of the left leg. There is lack of tone in the muscles,—they have wasted away to a certain extent, while there is still some use of it. The front of the abdomen has a horseshoe shaped scar, which is sensitive because of the nerve in the scar, which was made at the time the shell was extracted. In examining his urine, I find he has some inflammation of the bladder. I had his blood tested for syphilis, and found that absolutely negative. There is no syphilis in the case. I had some X-rays taken, which I have brought with me, which show an injury to the third lumbar vertebra, which was caused undoubtedly by trauma.

Whereupon, Plaintiff's Exhibit 1, an X-ray, was admitted in evidence.

WITNESS.—(Continuing.) This is an X-ray of the spine (indicating) showing part of the dorsal

(Testimony of Dr. Stewart V. R. Hooker.)

spine, the whole of the lumbar spine, and part of the pelvis. We see here in the third lumbar spine that there has been a fissure,—a fracture,—right through there so that this part of the transverse process was loosened. Then we see a little piece here which is not normal, as you notice,—the area on the top of the vertebra is not smooth. Here we have another small piece which was probably broken off at the time of the entry of the shell. You will notice that this transverse spine here is nicely rounded, and has no evidence here of having been broken, and that the entrance of this piece of shell was opposite the second lumbar vertebra here. Therefore, it must have been going downward and inward when it hit, and the injury was to this transverse process. There must have been a tearing of the nerves and a considerable hemorrhage in there. When that sort of thing hit his spine there was more or less of an explosive effect inside of the spinal canal, and hemorrhage, with pressure on that spine, caused great damage to the spinal cord. [19]

The skin is very sensitive to the touch to any little irritation above the point of injury, and that is practically always present in injuries to the spinal cord. The condition that I found in this man is a constant source of irritation, and makes the person nervous, and his nerves are unstable. There is bound to be pain. In an inner lesion like that there is scar formation which must press on nerves, and the pressure must cause pain. There

(Testimony of Dr. Stewart V. R. Hooker.)

might be pain in any part of the body to which those nerves radiate. It would be practically impossible for him to concentrate or study. It would be impossible for him to engage in physical exertion, because he cannot use his legs sufficiently to do anything requiring it. If he used his arms or any part of his body, he would gradually go downward. He would not last any time. One or two days would probably be his limit on any steady occupation. In my opinion, the same result would follow in occupations involving mental effort. In my opinion he will never be well.

The witness, STEWART V. R. HOOKER, testified further as follows on

Cross-examination.

I am speaking now of the condition I found at the time of my examination. I saw him first this month on the 8th of October, this year. I never saw him before that time. Most of his trouble is due to this transverse myelitis. Transverse myelitis is a lesion of the spinal cord. I found nothing else than this transverse myelitis which would keep him from following many types of gainful occupations. I found the transverse myelitis is practically his only disability.

(Testimony of Dr. Stewart V. R. Hooker.)

The witness, STEWART V. R. HOOKER, testified further as follows on

Redirect Examination.

In my opinion, the cause of the transverse myelitis was [20] due to the fact that he had been hit with this shell. Taking the examination of the patient into consideration and the X-rays, it must have been due to trauma.

TESTIMONY OF O. G. FAIRBURN, FOR PLAINTIFF.

O. G. FAIRBURN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination.

My name is O. G. Fairburn. I am Regional Manager of the United States Veterans' Bureau, Seattle, Washington. I have brought with me the files and records of the United States Veterans' Bureau concerning the plaintiff's case. I have with me the ratings of the Veterans' Bureau, which they have made for his disability since the time of discharge. They are as follows: Temporary partial twenty per cent from the date of separation from active service to April 28, 1921. Temporary partial ten per cent from April 28, 1921, to January 6, 1922. Total temporary from January 6, 1922, to January 30, 1922. Temporary partial ten per cent from January 30, 1922, to June 16, 1922. Per-

(Testimony of Dr. Stewart V. R. Hooker.)

manent total from June, 1922, to date. These ratings of disability are on account of the transverse myelitis. They are on account of the gunshot wound and the transverse myelitis, and made as a result of examination of the doctors of the Veterans' Bureau.

The witness, O. G. FAIRBURN, testified further as follows on

Cross-examination.

The first examination of this man was under date of August 22, 1919, by Dr. A. W. Sibert. There is one before that, I believe, by Dr. A. W. Sibert. The diagnosis which was given was high explosive shell wound. I find no diagnosis of transverse myelitis at that time. The first rating of twenty per cent was made on that condition. The next examination was made on [21] August 29, 1919, signed by the surgeon of the United States Public Health Service. Diagnosis was wound of back. Gunshot. Healed. There was no diagnosis of transverse myelitis made at that time. There was no diagnosis of any nerve disability made either by the examination of August 22d, 1919, or August 29, 1919. The gunshot wound was the only thing found on this examination in the diagnosis. The next examination was made June 14, 1920, by Dr. Paul I. Carter. His diagnosis was wound at back healed. Pes planus,—flat feet. No diagnosis of transverse myelitis or of any nerve disability was made on that examination. The next examination

(Testimony of O. G. Fairburn.)

was made April 28, 1921. The diagnosis was pleuritic adhesions; pes planus bilateral; wound in back; cicatrix of skin; abdominal wall. No transverse myelitis or any nerve disability was found on that examination.

Mr. LONG.—If the Court please, I object to the form of the question. I have no objection to having him ask what the report shows.

The COURT.—Any nerve affection or nerve ailment? What does the report show?

A. The examination report does not show a diagnosis of any nerve ailment or nerve involvement.

The next examination was made June 14, 1921. A chest examination was made May 3, 1921. June 14 was the next general examination made under the direction of the United States Veterans' Bureau. The diagnosis upon that examination was pleuritic adhesions; pes planus second degree; wound of back; cicatrix of skin. Cicatrix of skin means scar. The report does not show any transverse myelitis; nor any nervous condition or ailment or disease.

The witness, O. G. FAIRBURN, testified further as follows on

Redirect Examination. [22]

The total permanent rating apparently appears to have been based on the examination of June 27, 1922. The diagnosis shows transverse myelitis; pes planus; gunshot wound on back and abdominal wall healed, also wound contused; sacral plexus

(Testimony of O. G. Fairburn.)
anterior crucial right side, also paralysis traumatic, nerves, sacral plexus right side, also tuberculosis chronic arrested; also myelitis transverse.

The witness, O. G. FAIRBURN, further testified as follows on

Cross-examination.

As far as the records of the Government show, the first diagnosis of transverse myelitis was made on the examination of June 27, 1922. That examination was made by Dr. Calhoun, who is now dead. The history of the development of the disability shown on the report is as follows: "Following gunshot wound October, 1918, lower limbs entirely paralyzed. Gradually got better until a year ago, since which time condition has been stationary until a month ago. At that time began to notice present symptoms and they seem to be gradually growing worse." That report was made June 27, 1922.

TESTIMONY OF JOSEPH HAYDEN, FOR PLAINTIFF.

JOSEPH HAYDEN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination.

My name is Joseph Hayden. I am the plaintiff in this case. I am thirty-nine years of age. I never finished the eighth grade. I live at 717–11th

(Testimony of Joseph Hayden.)

Avenue, Seattle, and have resided in Seattle between twenty-five and twenty-eight years. I was in the army on October 5, 1918, in France, with the Fourth Division. On that date I was struck by a piece of high explosive shell and wounded; lay there one day and was *picked the* next morning and taken to the hospital and operated on. I [23] was put in a casual division and sent back to the States, and then to New York, and from there to Camp Lewis, and stayed there at Camp Lewis from March 19 until June 6. I was in the hospital all the time from October, 1918, until the date of discharge. When I came home I did not go to work. I was weak; I had slight pains in the leg and back that gradually disappeared. In a short time they called me to the Veterans' Bureau, and gave me an examination. In six months' time I got a report from Washington, D. C., saying that from date of discharge I would receive total disability. I received Plaintiff's Exhibit 2, marked for identification, from the Treasury Department, Bureau of War Risk Insurance.

Mr. LONG.—We will offer that in evidence, your Honor.

Mr. POPE.—I object to that as incompetent, irrelevant, and immaterial, not properly identified. It is merely a letter, which the Court held was not admissible in the Tracy case.

Mr. LONG.—Note the typewriting on the second paragraph.

(Testimony of Joseph Hayden.)

The COURT.—It is simply a letter advising him of a certain amount.

Mr. LONG.—It says he will draw that as long as the disability continues.

The COURT.—No, I think not. We don't know where the writer drew his information from.

Mr. LONG.—Exception.

I received Plaintiff's Exhibit 3, marked for identification, from Mr. Popwell, Chief of the Bureau of Claims of the Veterans' Bureau at Seattle, Washington.

Mr. LONG.—We will offer that in evidence.

Mr. POPE.—That is objected to as incompetent, irrelevant and immaterial, not the best evidence. We have the records here. [24]

The COURT.—This purports to be a letter stating or reciting something the records show. The records should be produced. If the records are appealed to, the records must be produced. When it comes to show what is on a record, the record must be produced.

Mr. LONG.—Exception.

The COURT.—It will be noted.

I did not do any work at all when I got back from the army during the year 1919. I was suffering slight pain in the legs, weakness. I was able to walk fairly well. I have been nervous ever since the day I got hit in France. I went into training about the latter part of 1919 with the Government. They gave me training in the City Light Substation at Lake Union. They were to teach

(Testimony of Joseph Hayden.)

me how to be a station operator, and all I did there was to sit in an easy chair and they tried to show me some things about switches, and all that, and while not doing that, we were playing cards. I did not do any work. I did not lift a pound. I did not do any work in any other city light plant. I was there two or three months. They transferred me to the Y. M. C. A. They thought maybe I could learn to be a wireless operator. I stayed at that training a few months, three or four maybe. I did no work at that time. Just attended classes. I couldn't seem to grasp wireless telegraphy, and they changed me to something else. They wanted to make me a postal clerk, and sent me to Wilson's Modern Business College in June or July, 1920. I discontinued training there in 1921. During that time I took the examination for a postal clerk, tried it out for a few hours at a time, from one to three hours in the evening. It tired me out. During the year 1921, I worked in the postoffice in the evenings for a short time, one to three hours. [25] That was not regular employment. Adding up all the hours, I would estimate that during the year 1921 I put in probably two or three months, maybe more, maybe less. During this period sometimes I felt quite well, and sometimes not very good. My legs would get numb, and I would go home, and then I would recuperate a bit. If I walked too much, I was in more pain. I noticed that working affected my condition. It affected the legs. They got numb and pained me. During the Christmas rush of 1921 I

(Testimony of Joseph Hayden.)

worked three or four or five days at the postoffice. I would stand it as long as I could, and then I would go out and smoke a few cigarettes and try it again. I didn't feel as good after that week's work. I left the Wilson School in August, 1921, and stayed home. About January, 1922, the Veterans' Bureau called me in for an examination, and they then sent me to Port Townsend hospital. I was there a month under the Veterans' Bureau. From the Port Townsend hospital, I came home. In May I got an appointment from the postoffice as substitute clerk. I went to work and I noticed the more I worked the worse I got, so finally, I think it was the 15th of June, was the last day I worked, and I had a hard time putting the day in, and I went down to the Veterans' Bureau on the 16th, and they sent me to the Providence Hospital. I was there three days, and completely collapsed, and they sent me to Portland, Oregon, on the 29th of June, 1922, as a stretcher case, and I stayed in Portland until August 9, 1923, most of the time in bed. Just prior to the time I went to Providence Hospital, was when I worked for two or three weeks steadily at the postoffice. At that time I got work as a substitute clerk. It was two or three hours, and then the last day I think it was eight hours. Prior to the last day I worked, I didn't really work more than two or three hours a day. The two weeks' work was about $16.00, at 60¢ an hour. I came home from Portland August 9, 1923. I have not done any [26] work at all since that time. My condition

(Testimony of Joseph Hayden.)

has been very poor. Numbness from the waist down; not very good use of the legs; sort of weak; nervous. I could hardly walk more than two or three blocks from home. There has not been any time since discharge that I have been free from pain, and there has never been any time when I have not been nervous. There has never been a time since discharge that I could concentrate on my work to any degree. I did my best in attempting to work at the postoffice.

The witness, JOSEPH HAYDEN, further testified as follows on

Cross-examination.

I went in training in 1919. First was at the City Light Department, and stayed there for two or three months. They did not seem to keep any track of when I would come and go. There was no one in charge. I was not there every day. I missed some days. I don't think there was any week that I didn't miss some. I cannot say that during October, 1919, I was there eight hours every day, with the exception of Sundays. I don't say it is true. Sometimes I may have stayed eight hours. I don't know just what days I stayed away in November. I would say that I was absent more than three days, excepting Sundays, in November, 1919. Probably two or three days more. I can't swear to it. I had no work to do. They didn't give me anything to do. They didn't ask me to do anything, except

(Testimony of Joseph Hayden.)

to learn the business. I went to the Y. M. C. A. for a few months. It might have been from January, 1920, to May 7, 1920. I was not there practically every day during that period. I was off lots of times. There was no school on Saturday. I would not say that I was there practically every school day. I attended when I could. I missed some days. I tried to go as much as I could. I would not say that I was regular, substantially all the time. I went when I could. When I could not, I stayed at home. I [27] probably attended three or four days a week. I do not remember being absent any week from school. I couldn't say what days I missed or what days I attended in 1920. I must have been absent some days in January, 1920. I don't remember any certain days. I don't remember that in February I attended every day except three days. I wouldn't say that I was absent more than three days. I do not remember that I attended every school day in March, 1920. I do not remember any absences. I don't remember that I attended all the school days in April and May, up to the time I quit. Lots of times I left early. I went home in the afternoons lots of times. They let me go home early lots of times. I didn't do any work at the Y. M. C. A. I was going to school. They didn't ask me to do anything. When I left there I was sent for further training to Wilson's Modern Business College. I think I was there from about July 1, 1920, until about August 7, 1921. The only thing I was studying was a little Arithmetic,

(Testimony of Joseph Hayden.)

Bookkeeping and Penmanship. I did not study any English or Spelling. I did not take the full course. I don't know what the course consisted of. I missed quite a lot of time. I couldn't say that I attended every school day during July, August, September and November of 1920. I don't remember any days that I missed during that period. I don't remember that I attended three-fourths of the month of December, 1920. I don't remember that I attended three-fourths of the month of January, 1921. I was there until August, 1921. I don't know that I attended this school all the school days in March, February and April, 1921. I missed some days sometimes. I couldn't say how many. I don't know that I was present three-fourths of the month of May, 1921. I can't say that I attended one week in August, and was present during June and July, 1921, every school day, except one week in July. I do not remember that I took the Civil Service Examination about December, [28] 1921. My signature is on Government Exhibit No. 4, marked for identification. You have the dates wrong. It is 1920. I made application in 1920. I must have delivered it to the Civil Service Commission in connection with my application. This handwriting filling out the form is mine. I remember an examination by the doctor. I don't know just what time. I don't recall signing it. I must have. It was merely a matter of form. The United States Civil Service Commission kept it. I don't know who got it.

(Testimony of Joseph Hayden.)

Whereupon Government's Exhibit 4, marked for identification—an application for U. S. Civil Service Examination—was admitted in evidence as Government's Exhibit No. 4.

Whereupon Government's Exhibit No. 5, marked for identification attached to Exhibit No. 4, was admitted in evidence as Government Exhibit No. 5.

I think the signature on Government's Exhibit No. 5 is mine. I worked during the Christmas rush of 1921. I had work in the postoffice a total of two or three months in 1921. While I was going to Wilson's Business College, I would work in the evenings from one to three hours, off and on. I would work not over two or three hours, sometimes in the evening in the postoffice while I was attending Wilson's Business College. After I got out of Wilson's Modern Business College, I worked three or four days at Christmas time in the postoffice. I was a substitute. That was after the Civil Service Examination. I did not work when they needed me. I worked when I felt like it. They didn't have any special time. I had no definite assignment of hours. Between August, 1921, and the end of 1921, I worked during the Christmas rush. I did no other work. I may have worked at few hours off and on at the postoffice during February, March and April, 1922. I might have worked [29] for a few hours. The last day I remember of working was the 15th of June, and the next day I went to the hospital. I was discharged June 6, 1919. I paid no premiums on my insurance after discharge from service.

(Testimony of Joseph Hayden.)

The witness, JOSEPH HAYDEN, testified as follows on

Redirect Examination.

After I received total and permanent rating in the month of June, 1922, it carried with it $100.00 per month.

Q. Now, prior to the time,—that time,—had you been drawing from the Government the amount of money upon a total disability rating?

Mr. POPE.—I object to that as another way of getting around the Court's ruling.

The COURT.—Sustained. Proceed.

Mr. LONG.—Exception.

When I submitted myself for examination to Dr. Turpin, as shown in Government's Exhibit 5, there was a very short examination. I don't know if it was Dr. Turpin who examined me. It seems to me it was a tall, skinny doctor by the name of Edwards. He made no X-rays. He did not examine my back. He did not give me any nerve tests. He did not ask me for any history of my wound. He asked me how I got it. I said, "In service."

The witness, JOSEPH HAYDEN, further testified as follows on

Recross-examination.

I don't remember if Dr. Turpin examined me, but I do remember the examination. I don't remember who examined me. I don't remember what

(Testimony of Joseph Hayden.)

the conversation was. I know what a nerve test is. I never got a nerve test. The only handwriting I signed is right there. (My signature.) I got an eye test, a hearing test, but no nerve test. I didn't go up there to complain. [30] I thought I could make my own living.

Q. Did you complain of any disability that he made an examination for?

A. He didn't get them all.

Q. Did you give him all?

A. That was up to him.

Q. You signed that (showing document)?

A. Yes.

TESTIMONY OF WILLIAM G. HAYDEN, FOR PLAINTIFF.

WILLIAM G. HAYDEN, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows on

Direct Examination.

My name is William G. Hayden. I am a brother of the plaintiff. Since he came home from the army, I have lived at 717–11th Avenue. The plaintiff has lived there, too. I have been in a position to observe his condition during that period, and how he acted around the house. He was very irritable, almost impossible to live with him. He has been that way ever since he came back. He was not that way before. Whenever he worked in the

(Testimony of Mrs. Emma Hayden.)
postoffice, he seemed to be worse. Many times have I observed evidences of his being in pain. I have observed that at all times since he came back.

TESTIMONY OF MRS. EMMA HAYDEN, FOR PLAINTIFF.

Mrs. EMMA HAYDEN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination.

My name is Mrs. Emma Hayden. I am the mother of the plaintiff. He has been at my house ever since he came back from the army, except when he was in the hospital. I have observed his nervous condition. He has always been very nervous since he came back from the war. [31]

WHEREUPON, the policy of insurance and disagreement with the Bureau as to plaintiff's claim for payment thereof was conceded by the defendant.

WHEREUPON plaintiff rests his case, and the Government moved for a nonsuit as follows:

Mr. POPE.—The Government at this time moves for an involuntary nonsuit on the ground and for the reason that the evidence adduced for and on behalf of the plaintiff has failed to establish a *prima facie* case and is legally insufficient to sustain a verdict, and that he has not proven any permanent and total disability while the policy of insurance was in force and effect.

THEREAFTER followed argument on the motion by Mr. Pope and Mr. Long.

WHEREUPON the Court rendered an oral opinion granting the motion, and the following proceedings were had:

The COURT.—On the motion for a nonsuit the Court determines whether or not as a matter of law there would be support for a verdict in favor of the plaintiff, provided the jury should so find, and in order to arrive at that determination, the Court must determine the evidence as the jury would under the law and in a light as reasonably favorable to the plaintiff as the evidence will bear.

Now, in this case, it appears that the plaintiff left the army in June, 1919, and at that time he had a policy of insurance in the sum of Ten Thousand Dollars, which provided that if he was killed, or died, or became totally and permanently disabled during the lifetime of the policy, he would recover some fifty-seven [32] dollars a month. After he left the army he paid no more premiums upon his policy. This policy of insurance with the Government is like any other policy with any other life insurance company; it is a contract entered between the insurer and the insured providing that, in consideration that the insured pay so much a month as premiums, if, while the insurance is in force, he becomes totally and permanently disabled, the insurer will pay him the sum provided in the policy. It bears the same relation as the insured and the insurer in any other complaint. However, the plaintiff, departing from the army in July, 1919,

paid no more premiums. Now suit is brought almost ten years later—it was brought in May of this year, ten years less two months—wherein the plaintiff alleges that he left the army in July, 1919, and was totally and permanently disabled, and is and has been all the time since, totally and permanently disabled. Now, if he was permanently disabled, but not totally disabled, that would not entitle him to recover. It is total and permanent disability that entitles him to the money, and unless he was so disabled in July, 1919, if he didn't pay his premiums and failed to keep up his part of the contract, he cannot ask the Government to perform its part.

What is the evidence? He undoubtedly during the war had received a serious wound, and undoubtedly it caused a lesion which affected the spinal cord, muscles and nerves. But the question is: Had it then caused total and permanent disability? It is not enough that he received a wound which, in the course of time, caused total and permanent disability, because the policy expired if he was not totally and permanently disabled at that time [33] when he failed to pay any more premiums, and no after effects of the wound gradually coming on would entitle him to the money. After he left the army in 1919, with the effects of the wound upon him, he came home, and presents evidence that he was examined by many doctors, and this evidence discloses their findings upon examination. He presents that evidence, some of which favors him, and some of it not. He cannot pick and choose, but must take the record as it stands; and he rests his

case upon that testimony. There is no other medical testimony from the time that he left the army, except the doctor who examined him just a short while ago, save the doctor who examined him for the Civil Service Examination and the Veterans' Bureau.

Dr. Hooker says that this present condition is due to the shell, or the shock of the wound, but he does not say that it came on instantly at the time he was struck by the shell. On the contrary, all the evidence shows that it was gradually growing worse until the present condition. The examination of the doctors of the Veterans' Bureau shows their findings that he was twenty per cent disabled. That is a long ways short of total disability. He was examined in April, 1921, two years later—still twenty per cent. He was examined in May, 1921, and was rated temporary partial ten per cent. January, 1922, temporary total from the 6th of January to the 30th of January, 1922, but that was two years after the policy had expired. A little later, in May of that year, ten per cent, and from June, 1922, he has been permanently and totally disabled. There isn't anything to dispute that all of this *time had* been drawing money from the Government, compensation, as a permanently and disabled man, $100.00 [34] a month. This falls short of proving, under any reasonable consideration of this evidence, that he was totally and permanently disabled from the time that he left the army, because all the medical testimony of that time and up to two years later, which he presents, shows that he was only partially

disabled, twenty per cent, ten per cent, and three years later, totally and permanently disabled.

From all the evidence of the doctors, and that evidence is before the Court, his ailment is entirely due to the shell wound. Nothing said about shell shock. Nervous, yes. We are all nervous, tired, irritable, hard to live with at times, and all through the examinations, twice in August, 1919, in June, 1920, in April, 1921, May, 1921, and until June, 1922, the only ailment was shell wound and flat feet, scar in abdomen showing the wound in the back, and adhesion, on which they gave him this rating.

This plaintiff was unfortunate, if he wanted his insurance, that he didn't keep up his premiums. Apparently, he had no thought himself that he was totally and *permanently, because* he didn't find it necessary to bring his suit until nearly ten years later.

The evidence, as the Court views it, as a matter of law, is wholly insufficient, and if the jury were inclined to return a verdict favorable to the plaintiff on this evidence, the Court would be bound to turn it aside. The motion for a nonsuit is granted. That disposes of the case so far as the jury is concerned (to the jury). You will be excused until Tuesday, ten o'clock.

Mr. LONG.—Please note our exception.

The COURT.—It will be noted. [35]

Received a copy of the within bill of exceptions this 29 day of Nov., 1929.

ANTHONY SAVAGE,
Attorney for Deft.

Presented by

PAUL, LONG & CARLSON,
Attys. for Plaintiff.

[Endorsed]: Filed Nov. 29, 1929. [36]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

The above cause coming on for hearing on this day, on the application of the plaintiff to settle his bill of exceptions heretofore duly lodged in this cause, and it appearing to the Court that the time within which to serve and file his bill of exceptions in the foregoing cause has been duly extended, and that said bill of exceptions as heretofore lodged with the Clerk is duly and seasonably presented for settlement and allowance; and it further appearing that said bill of exceptions contains all the material facts occurring upon the trial of the case, together with the exceptions thereto, and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions by reference and incorporation; and the Court being fully advised, it is by the Court

ORDERED, that the said bill of exceptions be and the same hereby is settled as a true bill of exceptions in said cause, which contains all of the material facts, matters, things and exceptions thereto occurring upon the trial of said cause, and

the same is hereby certified accordingly by the undersigned Judge of this court, who presided at the trial of the said cause, as a true, full and correct bill of exceptions, and the Clerk of the court is hereby ordered to file the same as [37] a record in said cause, and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Signed in open court this 11 day of December, 1929.

BOURQUIN,
United States District Judge.

Presented by:

PAUL LONG & CARLSON,
Attorneys for Plaintiff.

O. K. and complete and correct.

TOM DeWOLFE,
LESTER E. POPE,
Attys. for the United States.

[Endorsed]: Filed Dec. 13, 1929. [38]

[Title of Court and Cause.]

ORDER ALLOWING CLERK TO TRANSMIT ORIGINAL EXHIBITS UPON APPEAL.

This matter having come on duly and regularly before the Court upon the motion of the plaintiff for any order allowing the Clerk in the above-entitled court to transmit with the record on appeal herein the originals of all the exhibits of the plain-

tiff and defendant heretofore filed in this action, and the Court having considered said motion and the affidavit thereto attached, and being duly advised in the premises,—

NOW, THEREFORE, IT IS ORDERED that the Clerk of the court herein be allowed to transmit with the record on appeal the originals of all the exhibits of the plaintiff and defendant heretofore filed in the above-entitled cause.

Done in open court this 23 day of January, 1930.

JEREMIAH NETERER,
United States District Judge.

Presented by:
ORVILLE MILLS.
O. K.—DeWOLFE,
Asst. U. S. Atty.

Received a copy of the within order this 23 day of Jan., 1930.

ANTHONY SAVAGE,
Attorney for Deft.

[Endorsed]: Filed Jan. 23, 1930. [39]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please send to the United States Circuit

Court of Appeals papers and record on appeal as per attached slip.

LONG & HAMMER,
Attys. for Plaintiffs.

NOTICE—Attorneys will please endorse their own Filings, Rule 11. [40]

1. Complaint.
2. Answer.
3. Reply.
4. Judgment and notice of presentation of judgment.
5. Stipulation and order extending time up to and including December 1, 1929, in which to lodge the bill of exceptions and extending the term of court.
6. Bill of exceptions and order settling bill.
7. Notice of appeal.
8. Petition for appeal.
9. Assignments of error.
10. Order allowing appeal.
11. Bond on appeal.
12. Citation on appeal.
13. Notice of change of firm name of attorneys.
14. All exhibits.
15. This praecipe.

Copy received.

DeWOLFE,
Asst. U. S. Atty.

[Endorsed]: Filed Jan. 21, 1930. [41]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 50, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing-entitled cause, as is required by praecipe of counsel, filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [42]

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 104 folios at 15¢ $15.60
Appeal fee (Sec. 5 of Act) 5.00
Certificate of Clerk to Transcript of Record, with seal ..... .50
Certificate of Clerk to original exhibits, with seal ..... .50

Total $21.60

I hereby certify that the above cost for preparing and certifying record, amounting to $21.60, has been paid to me by the attorneys for the appellant.

I further certify that I herewith transmit the original citation issued in the above-entitled cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 5th day of February, 1930.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington.

By S. E. Leitch,
Deputy. [43]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Northern Division.

The President of the United States, to the United States of America, Defendant Above Named, and Anthony Savage, Tom DeWolfe and Lester E. Pope, Attorneys for Said Defendant:

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals to be held in the city of San Francisco, California, in the Ninth Judicial Circuit Court, on the 14th day of February, 1930, pursuant to order allowing appeal filed in the office of the Clerk of the above-entitled court, appealing from the final judgment signed and filed on the 18th day of November, 1929, wherein Joseph Hayden is plaintiff and the United States of America is defendant, to show cause, if any there be, why the judgment rendered against the said appellant as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESSETH, the Honorable JEREMIAH NETERER, United States District Judge for the

Western District of Washington, at Seattle, this 15 day of January, 1930.

[Seal] JEREMIAH NETERER,
United States District Judge.

Received a copy of the within citation this 15 day of Jan., 1930.

ANTHONY SAVAGE,
Attorney for Deft.

[Endorsed]: Filed Jan. 15, 1930. [44]

[Title of Court and Cause.]

NOTICE OF APPEAL.

United States of America,
Western District of Washington,
Northern Division.

To the United States of America, Defendant, and Anthony Savage, Tom DeWolfe, and Lester E. Pope, Attorneys for Said Defendant:

You, and each of you, will please take notice that Joseph Hayden, plaintiff in the above-entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order entered in the above-entitled cause on the 18th day of November, 1929, and that the certified transcript of record will be filed in the said Appellate Court within thirty (30) days from the filing of this notice.

Received a copy of the within notice of appeal this 9 day of Jan. 1930.

ANTHONY SAVAGE,
Attorney for Deft.
PAUL, LONG & CARLSON.
PAUL and LONG and CARLSON,
Attorneys for Plaintiff.
660 Central Building,
Seattle, Washington.

[Endorsed]: Filed Jan. 10, 1930. [45]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The above-named plaintiff, feeling himself aggrieved by the order, judgment and decree made and entered in this cause on the 18th day of November, 1929, does hereby appeal from said order, judgment and decree, in each and every part thereof, to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors herein; and said plaintiff prays that his appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order, judgment and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals

for the Ninth Circuit, as by the rules of said Court in such cases made and provided.

PAUL, LONG & CARLSON.
PAUL, LONG & CARLSON,
Attorneys for Plaintiff.

Received a copy of the within petition for appeal this 9 day of Jan., 1930.

ANTHONY SAVAGE,
Attorney for Deft.

[Endorsed]: Filed Jan. 10, 1930. [46]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS OF PLAINTIFF.

Comes now Joseph Hayden, plaintiff in the above-entitled action by Long & Hammer, the attorneys of record, and in connection with his notice of appeal herein and petition for appeal herein, assigns the following errors which he avers occurred at the trial of said case, which were duly excepted to by him and upon which he relies to reverse the judgment herein.

I.

That the District Court erred in sustaining defendant's objections to Plaintiff's Exhibit 2 marked for identification purposes, and that said court erred in rejecting Plaintiff's Exhibit 2 when offered in evidence by the plaintiff. That said Plaintiff's Exhibit 2 marked for Identification purposes was

by the plaintiff identified as a document received by the plaintiff from the treasury department, Bureau of War Risk Insurance, and that said Plaintiff's Exhibit No. 2 is in substance a letter from the Treasury Department, Bureau of War Risk Insurance awarding compensation to the plaintiff for disability resulting from injury incurred in the line of duty while employed in active service and that the proceeding with reference [47] to the rejection of said exhibit was as follows:

"Q. Handing you Plaintiff's Exhibit No. 2 marked for identification, I will ask you whether or not you received that document from the Treasury Department, Bureau of War Risk Insurance? A. I did. Yes, sir.

Mr. LONG.—We will offer that in evidence, your Honor.

Mr. POPE.—I object to that as incompetent, irrelevant and immaterial, not properly identified. It is merely a letter, which the Court held was not admissible in the Tracy case.

Mr. LONG.—Note the typewriting on the second paragraph.

The COURT.—It is simply a letter advising him of a certain amount.

Mr. LONG.—It says he will draw that as long as the disability continues.

The COURT.—No, I think not. We don't know where the writer drew his information from.

Mr. LONG.—Exception."

To which ruling the plaintiff took a separate exception at the time of trial herein.

II.

That the District Court erred in sustaining defendant's objections to Plaintiff's Exhibit 3 marked for identification purposes, and that the Court erred in rejecting said Plaintiff's Exhibit No. 3 when offered in evidence by the plaintiff. That said Plaintiff's Exhibit No. 3 was by plaintiff identified as a letter received by the plaintiff in the mail from Mr. Popwell, Chief of the Bureau of Claims of the Veterans' Bureau at Seattle, and that said Plaintiff's Exhibit No. 3 is [48] in substance a letter from R. L. Popwell, Chief of the Claims Division in the Regional Office at Seattle, Washington of the United States Veterans' Bureau stating the amount of the award to the plaintiff per month on account of disability, and that the proceedings with reference to the rejection of said exhibit was as follows:

Q. Handing you Plaintiff's Exhibit No. 3, marked for identification, I will ask you what that is?

Mr. POPE.—That speaks for itself.

A. Yes, sir.

Q. You received that from Mr. Popwell, Chief of the Bureau of Claims of the Veterans Bureau at Seattle, Washington?

A. I received that in the mail. Yes, sir.

Mr. LONG.—We will offer that in evidence.

Mr. POPE.—That is objected to as incompetent, irrelevant and immaterial, not the best evidence. We have the records here.

The COURT.—This purports to be a letter stating or reciting something the records show. The records should be produced. If the records are appealed to, the records must be produced. When it comes to show what is on a record, the record must be produced.

Mr. LONG.—Exception.

The COURT.—It will be noted.

To which ruling the plaintiff took a separate exception at the time of trial herein.

III.

That the District Court erred in sustaining defendant's objection to the following questions asked by the attorney for the plaintiff upon redirect examination. The proceedings [49] with reference to said rulings being as follows:

Q. After you received total and permanent rating in June of 1922, what amount of money did that carry with it? A. Per month?

Q. Yes. A. One hundred dollars.

Q. Now, prior to the time,—that time,—had you been drawing from the Government the amount of money upon a total disability rating?

Mr. POPE.—I object to that as another way of getting around the Court's ruling.

The COURT.—Sustained. Proceed.

Mr. LONG.—Exception.

To which ruling the plaintiff took a separate exception at the time of trial herein.

IV.

That the District Court erred in granting defendant's motion for an involuntary nonsuit at the close of the plaintiff's case, and that said Court erred in withdrawing said cause from the jury at the close of the plaintiff's case. To which ruling the plaintiff took a separate exception at the time of trial herein.

LONG & HAMMER.
LONG & HAMMER,
Attorneys for Plaintiff.

Received a copy of the within assignment of errors this 9 day of Jan., 1930.

ANTHONY SAVAGE,
Attorney for Deft.

[Endorsed]: Filed Jan. 10, 1930. [50]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On the application of the plaintiff herein,—

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore entered and filed herein on the 18th day of November, 1929, be and the same is hereby allowed, with bond in the sum of $250.

IT IS FURTHER ORDERED that a certified transcript of the record, testimony, exhibits and stipulations, and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 10 day of January, 1930.

NETERER,
United States District Judge.

[Endorsed]: Filed Jan. 10, 1930. [51]

Bond No. S–18591. Stock Company.

THE CENTURY INDEMNITY COMPANY,
Hartford, Connecticut.

KNOW ALL MEN BY THESE PRESENTS:

In the United States District Court, in and for the Western District of Washington, Northern Division.

No. 20,083.

JOSEPH HAYDEN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

BOND FOR COSTS ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Joseph Hayden, the plaintiff above named, as principal, and The Century Indemnity Company,

Hartford, Conn., a corporation organized under the laws of the State of Connecticut, and authorized to transact the business of surety, as surety, are held and firmly bound unto United States of America, the defendant above named, in the just sum of Two Hundred Fifty and no/100 Dollars ($250.00), for which sum, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 13th day of January, 1930.

The condition of this obligation is such, that whereas, the above-named United States of America on the 18th day of November, 1929, in the above-entitled action and court, recovered judgment against the plaintiff above named for the sum of Forty and 75/100 Dollars ($40.75) for costs, and dismissal of plaintiff's action.

And whereas, the above-named principal has heretofore given due and proper notice that he appeals from said decision and judgment of said United States District Court.

NOW, THEREFORE, if the said principal, Joseph Hayden, shall pay to United States of America, the defendant above named, all costs and damages that may be awarded against plaintiff on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars

($250.00), then this obligation to be void; otherwise to remain in full force and effect.

JOSEPH HAYDEN. (Seal)
By LONG & HAMMER,
His Attorneys.

THE CENTURY INDEMNITY COMPANY.
(Seal) By E. R. ROBBINS,
Attorney-in-fact.

Signed and sealed in presence of
E. WOODWARD.

O. K.—DeWOLFE,
Asst. U. S. Atty.

Approved:

NETERER,
Judge.

[Endorsed]: Filed Jan. 13, 1930. [52]

[Title of Court and Cause.]

NOTICE OF CHANGE OF FIRM NAME OF ATTORNEYS.

United States of America,
Western District of Washington,
Northern Division.

To the United States of America, Defendant, and Anthony Savage, Tom DeWolfe and Lester E. Pope, Attorneys for Said Defendant:

You and each of you, will please take notice that the law firm of Paul, Long & Carlson, attorneys of

record for the plaintiff herein, has been dissolved, and that the name of the successor to said firm is Long & Hammer, and that said Long & Hammer hereafter will appear as the attorneys of record for the plaintiff.

LONG & HAMMER,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 13, 1930. [53]

[Endorsed]: No. 6073. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Hayden, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 17, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6073

UNITED STATES CIRCUIT COURT OF APPEALS

Ninth Circuit

JOSEPH HAYDEN,

Appellant,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

BRIEF OF APPELLANT

LONG & HAMMER,
Attorneys for Appellant.

660 Central Building,
Seattle, Washington.

THE ARGUS PRESS - SEATTLE

No.....

UNITED STATES CIRCUIT COURT OF APPEALS

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UNITED STATES CIRCUIT COURT OF APPEALS

Ninth Circuit

JOSEPH HAYDEN,
Appellant,
—VS.—
UNITED STATES OF AMERICA,
Respondent.

No.....

BRIEF ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

BRIEF OF APPELLANT

STATEMENT

The appellant herein, Joseph Hayden, hereinafter called the plaintiff, was inducted into the military service of the United States of America on the 19th day of September, 1917, and was honorably discharged therefrom on June 6, 1919. On December 3, 1917, he applied for and was granted war risk insurance in the sum of $10,000, said insurance being evidenced by certificate No. 959377 and he authorized the deduction of premiums from his army pay. The premiums

were paid thereon up to and including the month of June, 1919. On October 5, 1918, while with the United States army in France serving with the fourth division, plaintiff was struck in the back by a piece of high explosive shell and wounded. He lay there one day and was picked up the next morning and taken to the hospital and operated on. He was put into the casual division, sent back to the United States to New York and subsequently to Camp Lewis where he stayed to the date of his discharge, June 6, 1919. All of the time, from October, 1918, to June 6, 1919, he was in the hospital. By reason of the disability arising from the foregoing injuries plaintiff has claimed that he became permanently and totally disabled from following any substantially gainful occupation. That said disability dates from the 5th day of October, 1918, and that by reason thereof plaintiff is entitled to the benefits of his war risk insurance from said date (R. 1 through 3). By answer of defendant's, paragraph 4, the disagreement between the plaintiff and the defendant is admitted (R. 5).

THE ISSUE BRIEFLY STATED IS: WAS THE PLAINTIFF PERMANENTLY AND TOTALLY DISABLED WHILE THE WAR RISK INSURANCE WAS IN FORCE, PRIOR TO JULY 1, 1919?

The case was tried to a jury and upon the close of the plaintiff's case, the plaintiff having rested, the defendant moved for an involuntary non-suit. The court granted defendant's motion for an involuntary non-suit and from judgment entered thereon (R. 10) plaintiff appeals.

ASSIGNMENTS OF ERROR

Plaintiff will rely upon Assignments 1, 2, 3 and 4 (R. 47, 48, 49, 50, 51):

I.

That the District Court erred in sustaining defendant's objections to plaintiff's Exhibit II, marked for identification purposes, and that said court erred in rejecting plaintiff's Exhibit II when offered in evidence by the plaintiff. That said plaintiff's Exhibit II, marked for identification purposes, was by the plaintiff identified as a document received by the plaintiff from the Treasury Department, Bureau of War Risk Insurance, and that said plaintiff's Exhibit II is in substance a letter from the Treasury Department, Bureau of War Risk Insurance, awarding compensation to the plaintiff for disability resulting from an injury incurred in the line of duty while employed in active service.

II.

The District Court erred in sustaining defendant's objections to plaintiff's Exhibit III marked for identification purposes and that the court erred in rejecting said plaintiff's Exhibit III when offered in evidence by the plaintiff. That said plaintiff's Exhibit III was by the plaintiff identified as a letter received by the plaintiff in the mail from Mr. Popwell, Chief of the Bureau of Claims of the Veterans Bureau in Seattle, and that said plaintiff's Exhibit III is in substance a letter from R. L. Popwell, Chief of the Claims Division, Regional Office at Seattle of the United States Veterans Bureau stating the amount of the

award to the plaintiff per month on account of disability.

III.

The District Court erred in sustaining defendant's objections to the following questions asked by the Attorney for the plaintiff upon re-direct examination:

"Q. After you received total and permanent rating in June of 1922, what amount of money would that carry with it?

A. Per month?

Q. Yes.

A. $100.00.

Q. Now, prior to the time,—that time,—had you been drawing from the Government the amount of money upon a total disability rating?

MR. POPE: I object to that as another way of getting around the Court's ruling.

THE COURT: Sustained. Proceed.

MR. LONG: Exception."

IV.

That the District Court erred in granting defendant's motion for an involuntary non-suit at the close of plaintiff's case and that said court erred in withdrawing said cause from the jury at the close of plaintiff's case to which ruling the plaintiff took separate exception at the time of trial herein.

ARGUMENT

I.

Exclusion of Evidence

Plaintiff's first three assignments of error may be well discussed under one head as to exclusion of evidence. In an early part of the trial plaintiff offered in evidence Exhibit II and Exhibit III, the former being identified as a letter from the Treasury Department, Bureau of War Risk Insurance, awarding compensation to the plaintiff for disability resulting from an injury incurred in the line of duty while employed in active service, and the latter being identified as a letter from the Regional Office at Seattle of the United States Veterans Bureau, stating the amount of award to the plaintiff per month on account of disability. The questions to which objections were sustained by the Court as assigned in III were questions relating to the amount of disability which the plaintiff was receiving prior to June of 1922. In all three instances the evidence which was sought to be introduced was evidence of the disability rating which the Veterans Bureau had given to the plaintiff from the time of his discharge. It was competent evidence to show the extent of disability of the plaintiff. It was material to the case and it was error to exclude it.

II.

It Was Error to Grant Defendant's Motion for an Involuntary Non-suit

Plaintiff's Evidence Was Sufficient to Sustain the Burden of Proof

In passing upon the defendant's motion for a non-suit the District Court stated the test of the evidence which should be applied was "whether or not as a matter of law there would be support for a verdict in favor of the plaintiff provided the jury should so find, and in order to arrive at that determination the Court must determine the evidence as a jury would under the law and in a light as reasonably favorable to the plaintiff as the evidence will bear." Admitting that to be a fair test to be applied, the question here presented is whether under the particular facts of this case, viewed in a light as reasonably favorable to the plaintiff as the evidence will bear, there would be support for a verdict in favor of the plaintiff. If the evidence herein would lend support to such a verdict then the Court erred in granting the non-suit.

It was only necessary for the plaintiff to show that he was disabled to such an extent as to be unable to follow continuously any substantially gainful occupation and that such disability is founded upon conditions which render it reasonably certain that it will continue through the life of the person suffering from it. The question as to what constitutes a permanent and total disability under the War Risk Insur-

ance Act has been before the Court upon numerous occasions.

> "Total disability is any impairment of the mind or body which renders it impossible for the disabled person to follow continuously any substantial gainful occupation."
>
> *United States v. Law*, 299 Fed. 61.
>
> "The term 'total and permanent disability' obviously does not mean that there must be proof of absolute incapacity to do any work at all. It is enough if there is such an impairment of capacity as to render it impossible for the disabled person to follow continuously any substantial gainful occupation."
>
> *U. S. v. Sligh*, 31 Fed. (2d) 735.

In the case of *United States v. Acker*, 35 Fed. (2d) 646, the following is said:

> "For a disability to be total within the meaning of the above referred to provision it is not necessary that the insured's condition be such as to render it impossible for him to engage in any substantial gainful occupation. It is enough that his condition be such as to render him unable in the exercise of ordinary care and prudence to engage continuously in any substantial gainful employment. Appellee's disability was not kept from being total by his intermittent business activities, if, without the exercise of ordinary care or prudence, they were engaged in at the risk of substantially aggravating the ailment with which he was afflicted."

Guided by these general views as to what consti-

tutes permanent and total disability the question in each case resolves itself into a question of fact as to whether the particular facts of a particular case show such permanent and total disability. The specific question with which we are concerned here is whether there was sufficient evidence to support a finding of the jury that there was a permanent and total disability prior to the last day of June, 1919, and in order to determine this question it becomes necessary to consider the evidence of this case. The plaintiff in his own testimony sufficiently established the fact that at the time of his discharge and that at all times since he has been unable to engage in any substantially gainful occupation. He testified that he was 39 years of age and that he had never had an education beyond the eighth grade. That on October 5, 1918, while in France serving with the Fourth Division he was struck in the back by a piece of high explosive shell and wounded. That he lay there for one day and was picked up the next morning and taken to the hospital and operated on. He was put in the Casual Division and sent back to the states. He was sent to Camp Lewis. He stayed at Camp Lewis until June 6, 1919, the date of his discharge. He testified that he was in the hospital all of the time from October, 1918, until the date of discharge (R. 22, 23). He testified that when he went home from the hospital in 1919 he was weak and had pains in the leg and in the back, and that about six months after his discharge he got a report from Washington, D. C., saying that from date of discharge he would receive total disability (R. 23). He did not do any work

when he got back from the Army during the year of 1919. He was able to walk fairly well but he was suffering pains in the legs and weakness and was nervous. In the latter part of 1919 he went in training with the Government in the City Light sub-station, Lake Union, where they were to teach him how to be a station operator. He did no work there, merely sitting in an easy chair. He was there two or three months and his testimony is that he did no real work while he was there (R. 24, 25). From there he was transferred to the Y. M. C. A. where they sought to teach him to be a wireless operator. He was in training there a few months, three or four, just attending classes (R. 25). From there in June or July, 1920, he was sent to Wilson's Modern Business College. He discontinued training there in 1921. During that time he took an examination for a postal clerk and tried to work at that for a few hours at a time. It tired him out though his work only lasted one to three hours in the evenings and he was not regularly employed (R. 24, 25). He testified that his legs would get numb and that he would have pains after working for any length of time. About January, 1922, he was called to the Veterans Bureau and sent to the Port Townsend Hospital (R. 26). He was there for a month. In May of that year he again attempted to do some work as a substitute clerk for the post office. The more he worked the worse he got and about June 15th he was forced to quit there and on the 16th of June he was sent to the Providence Hospital where he suffered a collapse and was sent to Portland, Oregon,

on the 29th of June, 1922, as a stretcher case, and stayed at Portland, Oregon, until August 9, 1923. Most of that time he was in bed. The work which he did was not steady and not regular work but was for two or three hours a day (R. 26). He testified that since the time he went to the hospital in June, 1922, he has done no work at all (R. 26). That his condition has been very poor and he has not had good use of his legs. That he has been weak and nervous. That he could hardly walk more than two or three blocks from home. That there had never been a time since discharge that he has been free from pain, and that there never had been a time since discharge when he could concentrate on his work to any degree (R. 27). The irregularity of his work and the irregularity of his attendance in his training and classes, both at the Y. M. C. A. and in Wilson's Business College, is brought out in the cross-examination (R. 27 through 30). He testified that in June, 1922, he received total and permanent rating for disability, carrying with it $100.00 per month (R. 31).

William G. Hayden, his brother, who has lived with him since the date of his discharge and who was in a position to observe his condition during all that period, testified that he had been very irritable, almost impossible to live with; that he had been that way ever since he came back and that whenever he worked he seemed to be worse (R. 32). Mrs. Emma Hayden, his mother, who was also in a position to observe him at all times since his discharge except when he was in the hospital, testified as to his nervous

condition and that he had been nervous ever since he came back from the war (R. 33). These are the facts and evidence of the plaintiff and of witnesses acquainted with the plaintiff having an opportunity to study his condition. Upon this evidence alone there is unquestionably evidence which would support a verdict of the jury for the plaintiff.

Dr. Stewart V. R. Hooker, physician and surgeon in Seattle, testified as to the condition of the plaintiff at the time of trial as based upon examination (R. 15):

> "I made a thorough examination of the plaintiff in the last few days. I found him suffering from transverse myelitis, which means a lesion of the spinal cord, which more or less paralyzes some muscles and some sensations below the point of lesion. This piece of shell entered the back about the level of the second lumbar vertebra, and evidently destroyed more or less of the nerve tissues. He is unable to walk well. He drags his left foot. There is an area of hypersensitiveness above the lesion, as we usually find in these cases." (R. 15-16) "We see here in the third lumbar spine that there has been a fissure,—a fracture,—right through there so that this part of the transverse process was loosened." (R. 17)

He demonstrated his testimony as to the injury to the spinal column upon plaintiff's Exhibit I, an X-ray. He testified that from his examination he found plaintiff had been hit by a shell which was going downward and inward when it hit and it in-

jured the transverse process and that when it hit his spine there was more or less of an explosive effect inside the spinal canal, and hemorrhage, with pressure on that spine, causing great damage to the spinal cord (R. 17). He further testified that it would be practically impossible for him to concentrate or study, and that it would be impossible for him to engage in physical exertion. That if he used his arms or any part of his body he would gradually go downward and would not last any time. "One or two days would probably be his limit on any steady occupation. In my opinion the same result would follow in occupations involving mental effort. In my opinion he will never be well." (R. 18) Dr. Hooker definitely testified that the cause of the transverse myelitis was due to being hit by the shell and was caused by trauma (R. 19).

Added to this testimony the records of the United States Veterans Bureau were in evidence introduced upon the testimony of O. G. Fairburn (R. 19) following the disability ratings of the plaintiff from discharge to date. They show from the first examination of the plaintiff a diagnosis of high explosive wound (R. 20). The ratings are as follows: "Temporary partial 20% from the date of separation of active service to April 28, 1921; temporary partial 10% from April 28, 1921, to January 6, 1922; total temporary from January 6, 1922, to January 30, 1922; temporary partial 10% from January 30, 1922, to June 16, 1922, and permanent total from June, 1922, to date." (R. 19-20) These ratings based upon various examinations are made as a result of ex-

amination of the doctors of the Veterans Bureau (R. 20). The total permanent rating appears to be based on an examination of June 27, 1922. The diagnosis shows transverse myelitis; pes planus; gunshot wound on back and abdominal wall healed, also wound contused; sacral plexus anterior crucial right side, also paralysis traumatic, nerves, sacral plexus right side, also tuberculosis chronic arrested; also myelitis transverse (R. 21-22). The history of the development of the disability as shown by the examination of June 27, 1922, discloses that following the gunshot wound of October, 1918, the lower limbs were entirely paralyzed and gradually the condition got better and remained stationary until a short time prior to the examination when the symptoms became worse (R. 22).

From all of this testimony there is one conclusion which we can arrive at conclusively and that is that at the time of the trial the plaintiff was permanently and totally disabled. Dr. Hooker's testimony is conclusive upon this point. The plaintiff's own showing of his inability to work and the records of the ratings in the Veterans Bureau establish without a doubt that he was permanently and totally disabled at the time of trial.

That this same condition and same disability was existent on June 27, 1922, is also conclusively shown by the evidence. Dr. Hooker testified that his disability was caused by transverse myelitis (R. 18, 19). The examination of June 27, 1922, discloses the condition of transverse myelitis then existent (R. 21). The rating given him at that time was that

of permanent and total disability (R. 20 and 21) and it needs no lengthy argument to show that the same condition upon which Dr. Hooker based his testimony to the effect that the plaintiff was permanently and totally disabled was existent in 1922 and was the basis for the rating at that time of permanent and total disability. The question then is whether or not prior to that time and prior to the last day of June, 1919, this same condition was present and the same disability existent. Our argument upon this question is ably stated in the case of *Marsh v. United States*, 33 Fed. (2d) 554, in the opinion by Martineau, District Judge, whose statement we think to be particularly applicable here. In that case the plaintiff had received a partial disability rating from the date of his discharge which was thereafter classed as a temporary total and subsequently changed back to temporary partial and finally classified as permanent and total. The Court said:

> "If the classifications given him by the Bureau may be taken as an indication of the progress of his disease, we must conclude that from the time of his discharge up to the present time his physical condition has grown gradually worse. Shortly after he was discharged he was classified as totally temporarily disabled. There has been no improvement in his condition, but subsequent facts and a better understanding of his ailment has demonstrated to the government physicians that his disability was permanent. If they were in doubt as to the nature of his disease

> or disability, it was perhaps entirely proper for them to classify it as total temporary, but, if after the lapse of time it is shown that the disability which he then had which was thought to be only temporary was in fact permanent, the court should classify it as a total permanent disability."

This is particularly applicable to this case. Here at the date of discharge plaintiff was given a temporary partial 20% rating. His rating continued as temporary and partial until June of 1922 when upon further examination it was changed to permanent and total. Subsequent facts and better understanding of his ailments had demonstrated to the Government physicians that his disability was permanent and total. Any doubt that there might have been as to the nature of his disease or disability has been dissolved and it is shown that he is permanently and totally disabled. From this evidence a jury may well draw a conclusion that the same disability has been existent from the date of the injury. The present case is not a case in which we have shown no cause of the condition. It is not a case where the question as to the time that the injury occurred is a question of inference. Dr. Hooker has testified that the gunshot wound received October 5, 1918, was the cause of the transverse myelitis (R. 19). The plaintiff's testimony shows that his condition had been substantially the same at all times since discharge (R. 24-26). The Government rating shows that at all times since discharge his disability has been based upon the gunshot wound (R. 20-21). No

subsequent injury has been shown, no subsequent occurrence or event that would cause permanent and total disability. The evidence clearly points to the fact that the disability was existent from the time that he received the gunshot wound, October 5, 1918.

The case of *La Marche v. United States*, 28 Fed. (2d) 828, was a case of an appeal in this Circuit from a directed verdict for the defendant and has many points in common with the present case. There the only testimony as to how, when or where the injury to the plaintiff occurred was that while under shell fire in France he was rendered unconscious and following this was subject to nervousness, and was confined frequently in hospitals, suffering from a nervous condition and pains through his body. The Court said:

> "We fully agree with the court that the testimony was sufficient on the question of total permanent disability, and that the question as to when, where, or how the injury to the hip was incurred was largely a matter of guess work and speculation; but the burden was only on the plaintiff to prove total permanent disability, and that such disability arose during the life of the policy. Mere inability on his part to prove the exact time and place of the injury to the hip was not fatal to his case if the jury was warranted in finding from the testimony that the injury and the accompanying disability occurred and existed during the life of the policy, and we think the testimony was sufficient to warrant such a finding. After August 4, 1919,

> the plaintiff in error was confined in hospitals for nearly a year and a half, and there is ample warrant for a finding of total permanent disability from and after that date. We think also the testimony would warrant a finding of total permanent disability at a much earlier date and while the policy was in effect. His condition and symptoms after August 4, 1919, did not differ materially from his condition and symptoms prior to that date, and if conditions existing on and after August 4 were attributable to the injury to the hip, might not the jury well find that similar conditions existing prior to that date arose from the same cause.
>
> "There was no evidence to compel a finding that the plaintiff in error received any injury between the date of the expiration of the policy and August 4, if indeed the testimony would warrant such a finding."

Here, as in that case, we think that the testimony warrants a finding of total and permanent disability at a time while the policy was in effect. Plaintiff's condition here did not differ materially from his conditions and symptoms at all times since discharge and if the conditions existing here on June 27, 1922, and to the date of trial, were attributable to transverse myelitis caused by the gunshot wound and injury to the spinal column, might not the jury well find that similar conditions existing prior to that time arose from the same cause? And here, as in the *La Marche* case, there is no evidence that the plaintiff received any injury between the date of

the expiration of the policy and the date that he received his rating as permanently and totally disabled. The development of the injury is linked up as a disability continuing in existence from the date that he received the gunshot wound on October 5, 1918.

If we were to disregard the medical evidence, the ratings of the Veterans Bureau, and the inferences therefrom and consider only the testimony of Joseph Hayden, the plaintiff, and of the two witnesses who knew him, we still believe that there is ample testimony that would warrant a jury in finding a total permanent disability from the date of October 5, 1918. Joseph Hayden's testimony discloses a pitiful condition, an inability to follow any substantially gainful occupation. His testimony discloses that he has tried to take training first in a light plant, then at a Y. M. C. A. school, and then at a business college, but that in all cases he has been unable to follow any occupation for any length of time. In the ultimate test of all these cases the ability which the plaintiff has demonstrated by his own actions as to whether he can or cannot follow continuously any substantial gainful occupation must be the test. This rule is supported by the case of *United States v. Acker*, 35 Fed. (2d) 646, where after considering the evidence the Court concluded:

> "As above indicated, a phase of the evidence supported a finding that appellee's disability was total within the meaning of the provision contained in the certificate sued on."

The rule is further borne out in the case of *United*

States v. Sligh, 31 Fed. (2d) 735, where the testimony as to the ability of the plaintiff to work was considered and the Court considering the testimony concludes that there was sufficient evidence from which the trial court could have concluded that there was a permanent and total disability. For further consideration as to the ability, as demonstrated by the work record of the plaintiff, as to whether or not he is able to follow a substantially gainful occupation, we cite the cases of *United States v. Elaisson*, 20 Fed. (2d) 821, and *Starnes v. United States*, 13 Fed. (2d) 212.

Taking then the facts of a finding by a doctor upon examination of permanent total disability at the time of trial, a rating of permanent and total disability by the Veterans Bureau since the 27th of June, 1922, together with the testimony of the plaintiff as to his inability to follow continuously a gainful occupation and the demonstration of this fact by the evidence as to his attempts to follow an occupation, and then considering that the injury, upon which the permanent total disability rating has been granted by the Veterans Bureau and upon which Dr. Hooker based his testimony, was an injury which has been existent and which occurred October 5, 1918, we submit that there is ample evidence to go to the jury, and that the jury would be warranted in finding that the plaintiff herein has been permanently and totally disabled from and since the date of October 5, 1918, when he received the gunshot wound.

Before concluding with the argument of the ap-

pellant we wish to call the attention of this Honorable Court to arguments used by the District Court in his ruling granting the motion for a non-suit which we believe are not proper considerations in such a case, and which we believe influenced and prejudiced the District Court in withdrawing the case from the jury. The Court stated:

> "This plaintiff was unfortunate, if he wanted his insurance, that he didn't keep up his premiums. Apparently he had no thought himself that he was totally and permanently (disabled) because he didn't find it necessary to bring this suit until nearly ten years later." (R. 37)

We submit to this Court that when the Congress of this country has seen fit in its benevolence to grant to the soldiers of this country a time within which they may bring a suit for their permanent and total disability, that that grant cannot be so indirectly taken away from the veteran by the ruling of the trial court. The question as to when the action was brought by the plaintiff has no place in the consideration of the evidence and is certainly not evidence from which a court can properly conclude that the plaintiff had no thought himself that he was totally and permanently disabled.

The District Court also in its ruling upon motion for non-suit stated:

> "This policy of insurance with the Government is like any other policy with any other insurance company. It is a contract entered between the insurer and the insured. * * *

It bears the same relation as the insured and the insurer in any other complaint."

We submit to this Court that this is not the view which this Court has taken of war risk insurance.

"War risk insurance established by the statute is not an out and out contract of insurance on an ordinary business basis nor yet a pension but that 'it partakes of the nature of both'."

United States v. Law, 299 Fed. 61.

"A policy of war risk insurance is more or less a gratuity from the Government and was so designed to be. The United States assumed all the extra risks of war and issued for the minimum premium what might be termed combined accident and life insurance policies largely in return for the sacrifices to be made by the men of the United States in defense of their country. These policies and the law generally are entitled to the most liberal construction in favor of the soldiers."

United States v. Cox, 24 Fed. (2d) 944.

"The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it, and the relation of the Government to them, if not *paternal*, was at least *avuncular*. It was a relation of benevolence established by the Government at considerable cost to itself, for the soldier's good."

White v. United States, 70 Law Ed. 531, 270 U. S. 283, 46 Sup. Ct. Rep. 20.

We have cited these two instances in the trial court's ruling for the purpose of demonstrating that there was not an unprejudiced and an unbiased weighing of the evidence in this case upon the motion for non-suit and submit to this Court that the evidence has not been viewed in a light as reasonably favorable to the plaintiff as the evidence will bear. We conclude that from all the evidence in this case that there is ample evidence that would warrant the jury in finding that the total and permanent disability was existent from the date of October 5, 1918, and during the existence of plaintiff's contract of insurance, and we submit that the District Court erred in taking the case from the jury and granting defendant's motion for an involuntary non-suit.

It is respectfully submitted that the judgment of the trial court be reversed and the cause be remanded for trial.

Respectfully submitted,

LONG & HAMMER,
Attorneys for Appellant.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6073

JOSEPH HAYDEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

BRIEF OF APPELLEE UNITED STATES OF AMERICA

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In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6073

JOSEPH HAYDEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

BRIEF OF APPELLEE UNITED STATES OF AMERICA

STATEMENT OF THE CASE

The statement of the case and the assignments of error relied upon by the appellant herein are fully set forth in the brief of appellant.

ARGUMENT

1. EXCLUSION OF EVIDENCE

It must be perfectly evident to this Court that the Court below did not err in refusing to admit in evidence Plaintiff's Exhibit 2. This Exhibit was not identified, is not shown to have been signed by any person authorized, and further is not competent or pertinent to the issues in the case at bar due to the fact that it deals with the assured's rating for compensation purposes only. It is well settled that the ratings of the Veteran's Bureau on compensation claims and payments on the same are not admissible in a suit against the government on a war risk insurance policy where the sole issue is the presence or absence of a permanent and total disability which precludes the assured from following continuously any substantially gainful occupation.

Golden vs. The United States, 34 Fed. (2nd) 367.

The rules laid down in the Golden case dispose of appellant's assignments of error 1 and 3.

Furthermore, there is no merit to appellant's

assignment of error number 1 due to the fact that the letter from the Veteran's Bureau referred to therein is plainly on a mimeographed form and probably mailed out by some typist from the Veteran's Bureau whose deductions may or may not have been based upon record facts, and as said by this Court in passing upon a similar question in *U. S. vs. Tracy*, 28 Fed. (2nd) 570 (9th C. C.A.), the letter "is incompetent to establish the correctness of such conclusions; the interest of the government cannot thus be put at jeopardy, nor does the vindication of plaintiff's rights require such a rule. If the typist's deductions were based upon record facts, the records are available to the plaintiff."

It will thus be seen that this Court in the *Tracy* case reversed the trial Court for receiving in evidence a letter similar to that which the plaintiff sought to have admitted in evidence at the trial herein.

2. PERTINENT STATUTES AND REGULATIONS

Section 400 of the Act of October 6, 1917 (40 Stat. 409):

> "That in order to give every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the Bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,0000, upon the payment of the premiums as hereinafter provided."

Section 402 of the Act of October 6, 1917 (40 Stat. 409):

> "That the Director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * * *"

Section 404 of the Act of October 6, 1917 (40 Stat. 410):

> "Regulations * * * * shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month."

Treasury Decision No. 47 W. R., promulgated July 25, 1919, and in force at the time of the discharge of the insured in this case:

> "When any person insured under the provisions of the War Risk Insurance Act leaves the active military or naval service for reasons not precluding the continuation of insurance, the monthly premium which, had he remained in the service, would have been payable on the last day of the calendar month in which he was discharged, will be payable on the first day of the calendar month following the date of his discharge, and thereafter monthly premius shall be payable on the first day of each calendar month. The premium payable on the first day of any calendar month may, however, be paid at any time during such month, which shall constitute a grace period for the payment of such premium. If the premium is not paid before the expiration of such grace period the insurance shall lapse and terminate."

Under this regulation and the admitted facts a premium became due in this case on June 1, 1919. It is undisputed that that premium was not paid, and it is further undisputed that unless the insured

became totally and permanently disabled during or prior to June 30, 1919, recovery can not be had.

Total permanent disability under this contract is defined by Treasury Decision No. 20 W. R., a regulation promulgated under and pursuant to statutory authority. It provides:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.
>
> " 'Total Disability' shall be deemed to be 'permanent' whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid, as provided in Article IV, on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue."

Regulations of the Bureau, promulgated pursuant to statutory authority, have the force and effect of law and the Court will take judicial notice

thereof. (*Cassarello vs. U. S.*, 279 Fed. 396, C. C. A. (3rd); *Sawyer vs. U. S.*, 10 Fed. (2nd) 416, C. C. A. 2nd).)

3. THE PLAINTIFF DID NOT MAKE OUT A PRIMA FACIE CASE

To recover in this case it was necessary for the plaintiff to prove and sustain the burden that rested upon him by a fair preponderance of the evidence that (1) the insured became totally disabled on or before June 30, 1919, and (2) the total disability was permanent on or before June 30, 1919.

To carry this burden five witnesses were produced. The plaintiff, his mother, his brother, a physician who examined him shortly prior to the trial herein, and one Fairburn who testified concerning the Veteran's Bureau records regarding the plaintiff herein.

The bill of exceptions, beginning on page 14 of the transcript of record herein, and continuing through to page 39 of the transcript herein, sets

out in narrative form the testimony relied upon by the plaintiff.

Analyzing the testimony of the plaintiff's physician who was called as his first witness it seems apparent that, briefly paraphrased, he testified to no more than that: (Tr. 15-18)

> That he first examined the plaintiff on the 8th of October, 1929, several weeks before the trial herein, and that he never saw him before that time. That the plaintiff's trouble is due to transverse myelitis, which is a lesion of the spinal cord, and he found nothing else than the transverse myelitis which would keep him from following many types of gainful occupations, and that the transverse myelitis was his only disability. (Tr. 18)
>
> He further testified that the cause of the transverse myelitis in his opinion was due to the fact that he had been hit with a shell. (Tr. 19) Transverse myelitis more or less paralyzes some muscles and some sensations below the point of lesion. The shell entered plaintiff's back about the level of the second lumbar vertebra, and destroyed, evidently, more or less of the nerve tissues. There is hypersensitiveness above the lesion. That is typical in these cases,—something pulling,—there is a loss of sensation to pin pricks, which is practically total in the right thigh, and a loss of ability to distinguish between heat and cold in the entire right leg and thigh. There is more disability in the left leg for the muscles are more paralyzed there. The reflexes,

known as knee jerks, are a little increased on both sides. There is a difference in the size of the thighs, the left one being smaller than the right. There is lack of tone in the muscles,—they have wasted away to a certain extent. Difference in size in the thighs is due to paralysis of the muscles of the left leg. There is a scar in the front of the abdomen which is sensitive. He has inflammation of the bladder.

There has been a fissure or fracture in the third lumbar spine so that this part of the transverse process was loosened. The area on the top of the vertebra is not smooth. The entrance of the piece of shell was opposite the second lumbar vertebra, and therefore must have been going downward and inward when it hit, and the injury was to the transverse process.

Plaintiff's skin is sensitive to the touch to any irritation above the point of injury. When the shell hit his spine there was more or less of an explosive effect, tearing the nerves and causing damage to the spinal cord. The plaintiff is nervous and unstable and in pain. He could not study or engage in physical exertion because he can't use his leg sufficient to do anything required of him, and can't use his arms. He can work steady only one or two days, either in physical or in mental work. He will never be well. (Tr. 17-18)

The testimony of the next witness, O. G. Fairburn, from the Veteran's Bureau at Seattle, shows

that the plaintiff was given the following ratings by the Veteran's Bureau: (Tr. 19)

> Temporary partial twenty per cent from the date of separation from active service to April 28, 1921. Temporary partial ten per cent from April 28, 1921, to January 6, 1922. Total temporary from January 6, 1922, to January 30, 1922. Temporary partial ten per cent from January 30, 1922, to June 16, 1922. Permanent total from June, 1922, to date. These ratings of disability are on account of the transverse myelitis. They are on account of the gunshot wound and the transverse myelitis, and made as a result of examination of the doctors of the Veterans' Bureau.

On cross-examination Fairburn testified: That the first examination was on August 22, 1919, and he said there was no diagnosis of transverse myelitis at that time. The first rating was made on that condition. The next examination was on August 29, 1919, signed by the United States Public Health Service. There was no diagnosis of transverse myelitis made at that time. There was no nerve disability diagnosis either in the examination of August 22, 1919, or August 29, 1919. The gunshot wound was the only thing found on this examination in the diagnosis. The next examination was made June 14, 1920, by Dr. Paul I. Carter. The diagnosis was wound at back healed, flat feet. There was no diagnosis of transverse myelitis or of any nervous disability at that time. The next examination was April 28, 1921. The diagnosis was pleuritic adhesions; pes planus

bilateral; wound in back; cicatrix of skin; abdominal wall. No transverse myelitis or any nerve disability was found on that examination. The examination report does not show a diagnosis of any nerve ailment or nerve involvement. (Tr. 21.)

The next examination was June 14, 1921. A chest examination was made May 3, 1921. Under the June 14th examination the report does not show any transverse myelitis or any nerve condition or ailment or disease, but only flat feet, pleuritic adhesions, scars in the skin and wound on the back.

On redirect examination Mr. Fairburn of the Veteran's Bureau testified:

That the total permanent rating was based on examination of June 27, 1922, and that said diagnosis showed transverse myelitis, flat feet, gunshot wound in back and abdominal wall healed, also wound contused; also myelitis transverse. (Tr. 21)

Fairburn further testified that the records of the government show the first diagnosis of transverse myelitis was made on the examination of June 27, 1922, which examination was made by Dr. Calhoun, who is now dead. (Tr. 22)

The witness stated that the history of the development of the disability shown on the report is as follows:

"Following gunshot wound October, 1918,

lower limbs entirely paralyzed. *Gradually got better until a year ago, since which time condition has been stationary until a month ago.* At that time began to notice present symptoms and they seem to be gradually growing worse." (Tr. 22).

That report was made June 27, 1922.

Briefly paraphrasing the substance of the testimony of the plaintiff herein, who was the next witness, (Tr. 22) we find that he testified: (Tr. 23)

That he was struck by a shell in France, was sent back to the states and from New York went to Camp Lewis and was in the hospital from October, 1918, until the date of discharge. When he came home he had pains in the leg and back that gradually disappeared. He did not do any work when he got back during the year 1918. Suffered pains in the legs and was very nervous. Couldn't walk very well. In the latter part of 1919 he went into training with the Government in the City Light Substation at Lake Union, learning how to be a station operator. He was there two or three months and was transferred to the Y.M.C.A. He stayed in training at the Y.M.C.A. two or three months and attended classes. He then went to Wilson's Modern Business College in July, 1920, and discontinued training there in 1921. During that time he took the examination for a postal clerk and tried said work one to three hours in the evening which tired him out. In the year 1921 he worked in the post office for a short time in

the evenings, one to three hours. During that time he felt quite well and sometimes not very good. (Tr. 25) His legs pained him and got numb. During the Christmas rush he worked at the post office. (Tr. 26) He left the business college in August, 1921, and stayed at home. In January, 1922, he went to Port Townsend hospital and was there a month. In May, 1922, he went to work again in the post office and quit the 15th of June when he went to the Providence Hospital. He was there three days and then went to Portland, Oregon until August 9, 1923. Most of the time in bed. His legs had been numb from the waist down and he had been weak and nervous and could not walk, and he has not been free from pain since his discharge. (Tr. 27)

On cross-examination (Tr. 27), he stated that he went in training in 1919, and was at the City Light Department and stayed there two or three months. From January, 1920 to May 7, 1920, he was at the Y.M.C.A. When he left there he went for further training to Wilson's Modern Business College from July 1, 1920, until about August 7, 1921. He admitted signing an application for employment as a postal clerk with the United States Civil Service Commission in 1920. This application was admitted in evidence and is government's Exhibit 4. He also admitted signing government's Exhibit 5, which was a medical certificate of an examination of the plaintiff by C. H. Turpin, January 22, 1921. He stated he worked in 1921 during the Christmas rush, and that while he was at Wilson's he would work in the evening for one to three hours off and on. After he got out of Wilson's Business College he worked three or

four days at Christmas time in the post office. That was after the Civil Service examination. He did not work when they needed him; between August, 1921, and the end of 1921 he worked during the Christmas rush. (Tr. 30) He may have worked a few hours off and on during February, March and April, 1922. He was discharged June 6, 1919, and paid no premiums on his insurance after discharge. (Tr. 30)

He stated that when he submited himself for examination to Dr. Turpin as shown in Exhibit No. 5, that was a very short examination. (Tr. 31)

On Recross-examination he stated he remembered the examination, but didn't remember who examined him.

Government's Exhibit 5 admitted in evidence as a part of the cross-examination of the plaintiff, with his signature affixed thereto, shows in detail the physical condition of the plaintiff at the time of the examination, to-wit, January 22, 1921, and shows that he was not permanently and totally disabled at that time. It shows that the applicant at that time was capable of prolonged and severe mental and physical exertion, and was equal to the demands of a very exhausting occupation and that there was no heart trouble and that the respiratory action of plaintiff's lungs was unobstructed. It showed further that the

plaintiff had at that time no defect in the functions of the brain or nervous system and that his limbs were normal and that there was no defect in arms or legs.

Government's Exhibit 5 referred to herein was admitted in evidence by the court below, subsequent to the time that the same had been used as a portion of a deposition on behalf of the government herein, and is found on the page following page 16 of the deposition of Dr. C. H. Turpin, which has been transmitted by the Clerk of the District Court to this Court, which deposition is not of itself an exhibit in this case, the only portion thereof being admitted in evidence being Dr. Turpin's report, government's Exhibit A-5, attached to page 16 of said deposition.

William G. Hayden testified as follows:

> That he was the brother of the plaintiff. That he observed the plaintiff when he came home from the war and that he was irritable and when he worked in the post office he seemed to be worse, and that he had observed evidence of plaintiff being in pain ever since he came back. (Tr. 32-33)

Mrs. Emma Hayden, plaintiff's mother testified: (Tr. 33)

That ever since plaintiff came back from the army he had been at her house and she had observed his nervous condition.

With the introduction of the foregoing evidence plaintiff rested and the government moved for a nonsuit and the motion was granted.

In the case of *Interstate Compress vs. Agnew*, decided by the Circuit Court of Appeals for the Eighth Circuit, and reported in 276 Fed. 882, it is stated:

"The rule in these courts (Federal Courts) is that in each case tried by a jury the question of law always arises at the close of the evidence whether or not there is such substantial evidence of the plaintiff's cause of action as will sustain a verdict in his favor and warrant the trial court in refusing in the exercise of its judicial discretion to set a verdict in his favor aside if rendered, and any evidence, a scintilla of evidence is not sufficient to warrant such a refusal. This question of law arises on a request for a peremptory instruction made before the case goes to the jury. The jurisdiction is conferred and the duty is imposed upon the trial court to decide it and, on exception, upon the appellate court to review that decision. The jury has no jurisdiction of this issue of law, and its verdict after the trial court has decided it does not deprive the appellate court of its jurisdiction or relieve it of its duty to review its decision by the trial court."

In *Northern Pacific Railroad Company vs. Jones*, 144 Fed. 47, the Court said:

> "Where, from any proper view of the undisputed or established facts, the conclusion follows as a matter of law that the plaintiff cannot recover, it is the duty of the trial court to direct a verdict. (Cases cited)"

In *Commissioners, Etc., vs. Clark*, 94 U. S. 278, 284; 24 L. Ed. 59, 61, the Court says:

> "Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to-wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

In *U. S. vs. Blackburn*, 33 Fed. (2nd) 564 (9th C.C.A.), the Court stated as follows:

> "While the testimony was ample to prove temporary total disability no witness, professional or lay, testified as to the nature of the illness from which the deceased was suffering, or as to the cause of his disability. The jury was left wholly to speculation and guess work on both of

these questions. Furthermore, the record fully discloses the fact that more satisfactory testimony was within the reach of the appellee. The physician whom the deceased consulted six months after leaving the army was not called as a witness, nor was any reason assigned for not calling him. The same may be said of the failure to call any of the physicians who must necessarily have attended the deceased during his long confinement in the different hospitals. In short, the jury was left with little or nothing to guide them in determining the vital issues in the case."

A study of the evidence in the Blackburn case will show that the plaintiff therein made a stronger prima facie showing to entitle the case to be submitted to the jury than was made on behalf of the plaintiff in the instant case. In the Blackburn case shortly after the deceased's discharge he consulted a doctor and was incarcerated in the hospital for a year. After that he spent a winter in the government hospital at Walla Walla and a winter or winters in the government hospital at Arizona, and later the deceased who was the assured in that case went to Monrovia, California, where he died in 1925. In the instant case, however, the assured immediately went in training after his discharge. He was in the City Light Department for three months. He then

went to the Y.M.C.A. for several months. After leaving the Y. M. C. A. he went to Wilson's Modern Business College and was there over a year. In 1920 he applied for a position with the postal department as evidenced by government's Exhibit No. 5, the application with the Civil Service Commission. While he was studying at Wilson's Modern Business College he worked during the evenings at the post office and it was not until late in 1922 that he went to the hospital. Obviously, if the evidence was insufficient to be submitted to the jury in the Blackburn case, no error was committed by the court below in granting the government's motion for a non-suit, due to plaintiff's failure to make a prima facie case.

Recalling here that total permanent disability within the contemplation of the contract now under consideration is defined by Regulation Treasury Decision No. 20 W. R., hereinbefore set out, and referring to paragraph three of the complaint wherein it is alleged that total permanent disability ensued on October 5, 1918, by reason of the insured having been wounded by a high explosive shell, and applying the "harsh" rule as referred to in *Commissioners, Etc. vs. Clark, supra,* it is submitted that there is

not a scintilla of evidence disclosed by the record of the plaintiff's case showing or tending to show that the insured was totally and permanently disabled at the time alleged or within the life of the policy. There was no medical testimony to show the physical condition of the plaintiff at the time of his discharge or at the time of the lapsation of the insurance. No physician examined him until immediately prior to the trial, to-wit, October, 1929. It is true that the evidence discloses at some time the plaintiff was injured but the evidence adduced in behalf of the plaintiff does not sustain the burden which rests upon him to prove a prima facie case by showing a total and permanent disability during the lifetime of the policy. There was not sufficient testimony adduced as to the nature of the illness from which the plaintiff was suffering or as to the cause of his disability, and certainly Dr. Hooker's testimony and the examination of Dr. Turpin as evidenced by government's Exhibit No. 5 do not disclose that by reason of the gunshot wound received in October, 1918, the plaintiff was, on or before June 30, 1919, permanently and totally disabled and thereby precluded from following continuously a substantially gainful occupation. Dr. Hooker did not testify that the present

condition came on instantly at the time plaintiff was struck by the shell. The evidence shows that the plaintiff got better until the report of June 27, 1922. (Tr. 2) The examinations of the Veteran's Bureau physicians show that he was only 20% disabled, and in 1921, two years after the lapsation of the policy, plaintiff was still found only 20% disabled. In May, 1921, he was rated temporary partial 10%. In January, 1922, temporary total from the 6th day of January to the 30th day of January, 1922, but the Court must bear in mind that this was two years after the policy had expired. A little later, in May of that year, he was rated 10%, and from June of that year he has been rated totally and permanently disabled.

Mr. Fairburn, one of the plaintiff's witnesses from the Veteran's Bureau, testified that none of the physical examinations of plaintiff as disclosed by the Veteran's Bureau, showed a diagnosis of transverse myelitis until the examination of January 27, 1922, and all through the examinations, twice in August, 1919, June, 1920, and April and May, 1921, until June, 1922, the only ailment of plaintiff was shell wound and flat feet, scarred abdomen, showing

wound in back and adhesion, on which the Veteran's Bureau gave him the above mentioned ratings.

Drawing from plaintiff's evidence every justifiable, favorable inference, it is submitted that the plaintiff utterly failed to make a prima facie case, and that the trial court did not err when, at the end of plaintiff's case, it granted the government's motion for a non-suit.

Plaintiff cites in his brief *U. S. vs. Sligh*, 31 Fed. (2nd) 735. What limitations there may be on the interpretation of the doctrines laid down in the *Sligh* case is best evidenced by the statement of Judge Dietrich in *U. S. vs. Barker*, 36 Fed. (2nd) 557 (9th C. C. A.), wherein he stated as follows:

> "From the facts shown to hold total disability would be to do violence to any common or reasonable understanding of the meaning of these terms. Not without hesitation we sustained the right of the plaintiff to recover in the *Sligh* case, 31 Fed. (2nd) 735, but to go further and yield to the contention of the plaintiff herein would be to ignore one of the material limitations of the policy."

La Marche vs. U. S., 28 Fed. (2nd) 828, is cited by the appellant in its brief herein. A casual perusal of the opinion of this court in that case will

show that the proof adduced in that case was much stronger on behalf of the plaintiff than in the case at bar. In the *La Marche* case plaintiff at the time of his discharge was examined by doctors and informed that he was suffering from shell shock. He was then treated for affliction of the nose and shortly after discharge proof showed he was in a nervous condition and unable to sleep. Shortly after his discharge and after the lapsation of his insurance the plaintiff in the *La Marche* case became seriously ill and was removed to the hospital. As already stated, the evidence in the case at bar does not disclose a continuous or permanent state of hospitalization until 1922, and furthermore affirmatively shows that immediately and for some time after his discharge and after the lapsation of his insurance the assured was engaged in vocational training and in other work.

In *McPhee vs. U. S.*, 31 Fed. (2d) 243 (9th C. C. A.), this court said:

> "In view, however, of another trial, we deem it proper to say that in our judgment the motion for a directed verdict was ample to challenge the sufficiency of the evidence, and should have been sustained."
>
> "We can find no evidence in the record

showing or tending to show that the appellee was totally and permanently disabled at any time before the policy expired. * * * "

"Total and permanent disability within the meaning of a war risk insurance policy does not mean absolute incapacity to do any work at all. *But there must be such impairment of capacity as to render it impossible for the assured to follow continuously some substantially gainful occupation, and this must occur during the life of the contract.*"

"War risk insurance is not a gratuity but an agreement by the Government, on certain conditions, to pay the assured certain sums per month if he becomes totally and permanently disabled while the contract of insurance is in force. The burden is on one suing on such a contract to show that he was in fact permanently and totally disabled, at some time before the contract lapsed." (Emphasis ours)

The judgment of the trial court granting the government's motion for non-suit was correct and proper and the judgment of dismissal should, therefore, be affirmed.

Respectfully submitted,

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No. 6074

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOHN M. WALSH and THOMAS A. KEARNEY, Trustees, W. M. KEARNEY and W. S. BROWN, as Executor of the Last Will and Testament of PATRICK WALSH, Deceased (Substituted as Defendant in the Place and Stead of PATRICK WALSH),

Appellants,

vs.

BANK OF LASSEN COUNTY, a Corporation, and MARY C. HILL, as Administratrix of the Estate of THOMAS HILL, Deceased,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6074

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOHN M. WALSH and THOMAS A. KEARNEY, Trustees, W. M. KEARNEY and W. S. BROWN, as Executor of the Last Will and Testament of PATRICK WALSH, Deceased (Substituted as Defendant in the Place and Stead of PATRICK WALSH),

Appellants,

vs.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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In the Northern Division of the United States District Court, Northern District of California.

EQUITY—No. 208.

BANK OF LASSEN COUNTY, a Corporation, and MARY C. HILL, as Administratrix of the Estate of THOMAS HILL, Deceased,

Plaintiffs,

vs.

JOHN M. WALSH and THOMAS A. KEARNEY, Trustees, and W. M. KEARNEY and PATRICK WALSH,

Defendants.

AMENDED BILL OF COMPLAINT.

(Jul. 7, 1927, Received.)

Now comes the plaintiff, Bank of Lassen County, a corporation, together with Mary C. Hill as Administratrix of the Estate of Thomas Hill, deceased, who is now joined with said Bank of Lassen County as a party plaintiff herein by permission of the Court first had and obtained, and file this amended bill of complaint, as follows, to wit:

1.

Plaintiffs complain of defendants on their own behalf, and also on behalf of all creditors having claims against the estate of Thomas Hill, deceased, which claims have been duly presented and allowed in the matter of the estate of said deceased, and who shall seek relief by and contribute to the expenses of this action; and for cause of action allege as follows:

That the plaintiff, Bank of Lassen County, is a banking corporation incorporated under the laws of the State of California and doing business at Susanville, in the County of Lassen, in said state. That the plaintiff Mary C. Hill, is the duly appointed, qualified and acting administrator of the estate of Thomas Hill, deceased. [1*]

2.

That the said creditors of the estate of Thomas

*Page-number appearing at the foot of page of original certified Transcript of Record.

Hill, deceased, are quite numerous, to wit, fourteen or thereabouts, several of whom are residents of the State of Nevada, and it is impracticable to bring them all before the Court in this action, wherefore plaintiffs sue for the benefit of all.

3.

That Thomas Hill was at all the times mentioned herein and prior to July 24, 1922, a resident of said County of Lassen, engaged in farming and stock raising and was at all of said times the holder of the record title to, and in the actual possession and control of those certain lands situate in said County of Lassen and particularly described as follows, to wit:

The W. ½ of NW. ¼, SE. ¼ of NW. ¼ and SW. ¼ of Sec. 2; E. ½, SW. ¼, S. ½ of NW. ¼ and NW. ¼ of NW. ¼ of Sec. 3; E. ½, S. ½ of SW. ¼and NE. ¼ of SW. ¼ of Sec. 4; E. ½ of NE. ¼ and SE .¼ of Sec. 8; N. ½, N. ½ of SE. ¼, and W. ½ of SW. ¼ of Sec. 9; N. ½ of N. ½ and SW. ¼ of NW. ¼ of Sec. 10; W. ½ W. ½ of E. ½ and E. ½ of SE. ¼ of Sec. 11; NE. ¼ of NW.¼ and W. ½ of NE. ¼ of Sec. 14; also a piece of land bounded as follows: Beginning at a point 10 chains west of the corner of sections 11, 12, 13 and 14, and running thence south 15 chains; thence south 58° 45′ west 11.78 chains to the quarter-quarter line; thence north along said quarter-quarter line 21.10 chains to the line between sections 11 and 14; thence east ten chains to the place of begin-

ning, being in said section 14, and all in Township 31 North, of Range 12 East, M. D. M.

Also SE. ¼ of SE. ¼ of Sec. 34 and W. ½ of SW. ¼ of Sec. 35, in Township 32 North, Range 12 East, M. D. M.

Also N. ½ of SW. ¼ of Sec. 2, and E. ½ of SE. ¼ of Sec. 3, in Township 31 North, Range 11 East, M. D. M.

Containing in all 3,218.58 acres, more or less according to Government survey.

4.

That said Thomas Hill died intestate in said County of Lassen on the 24th day of July, 1922, leaving estate both real and personal in said County, and leaving him surviving his wife, Mary C. Hill, and his and her eleven children, to wit: Mrs. Sadie Case, Cleveland (Cleve) Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Mrs. Florence [2] Hill Douglas, Mrs. Christine V. DeForest and Mrs. Maud B. McGregor.

That on or about the 25th day of May, 1923, letters of administration of the estate of Thomas Hill, deceased, were issued to said Mary C. Hill out of the Superior Court of the County of Lassen, State of California, and she ever since has been and still is administratrix of the estate of said deceased.

5.

That on or about the 21st day of April, 1919, for the purpose of obtaining credit with the plaintiff Bank of Lassen County the said Thomas Hill made

to said plaintiff a statement in writing purporting to be a fair and accurate statement of his financial condition; in which statement he listed as part of his assets real estate in Lassen County consisting of 3,500 acres, held in his name which, with the improvements thereon, he valued at $245,000.00, subject to a mortgage *line* of $30,000.00. That said land so listed by him included all the land hereinbefore particularly described.

That again, on or about the 19th day of June, 1922, said Thomas Hill, for the purpose of obtaining credit with said plaintiff, Bank of Lassen County, made to said plaintiff a statement in writing purporting to be a fair and accurate statement of his financial condition, in which statement he listed as part of his assets real estate in said County of Lassen consisting of 3,500 acres, upon which he placed a value of $245,000.00, subject to a mortgage lien of $30,000.00. That the land so listed by him included all the land which is hereinbefore particularly described.

That the mortgage lien referred to in said two statements, of the amount of $30,000.00, was a deed of trust made by said [3] Thomas Hill and Mary C. Hill, his wife, on December 15th, 1917, to Richard Kirman and Walter J. Harris, trustees, to secure an indebtedness to Farmers and Merchants National Bank at Reno, Nevada, which deed of trust conveyed to said trustees all of the lands which are hereinbefore particularly described.

6.

That relying upon the statements of his financial condition so made by said Thomas Hill as aforesaid, the plaintiff, the Bank of Lassen County, extended credit and made advanced of money to said Thomas Hill from time to time, and at the date of the death of said Thomas Hill said Bank held five notes of said Hill for moneys so advanced, which notes were severally dated and for the several amounts as follows, to wit:

Note dated March 15, 1922, for	$ 400.00
Note dated April 21, 1922, for	$5,000.00
Note *date* May 13, 1922, for	$2,000.00
Note dated May 26, 1922, for	$ 700.00
Note dated June 19, 1922, for	$ 350.00

Each of said notes was made payable six months after its date, and bears interest at the rate of eight per cent per annum, interest payable and to be *cp*ounded semi-annually. The interest on each of said notes has been paid in full to February 15, 1923, and there is now due, unpaid and owing to said Bank of Lassen County on account of said notes, the sum of $8,450.00, with interest thereon from February 15, 1923, according to the terms of said notes.

That on or about the 27th day of September, 1923, plaintiff, Bank of Lassen County, presented to Mary C. Hill, as administratrix of the estate of Thomas Hill, deceased, a creditors claim based on said notes, and said claim was thereafter on the [4] 11th day of January, 1924, allowed and approved by said administratrix and by Hon. H. D. Burroughs, Judge

of said Superior Court of the County of Lassen, for the sum of $8,450 and interest; and said claim after being so allowed *an* approved was filed in the office of the Clerk of said Superior Court in the matter of the Estate of Thomas Hill, deceased.

That said claim has not been paid nor any part thereof.

7.

Upon their information and belief plaintiffs allege, that on or about the 15th day of December, 1917, said Thomas Hill made, signed and acknowledged before a notary public, a bargain and sale deed, purporting to be made for and in consideration of the sum of $10.00, and purporting to convey to his wife, Mary C. Hill, the same lands which are hereinbefore particularly described. That no valuable nor any consideration passed from said Mary C. Hill or any other person in her behalf to said Thomas Hill at the time of the making or said deed, nor at any time thereafter. That on or about the said 15th day of December, 1917, said deed was by the said Thomas Hill placed in the custody of one Grover C. Julian, and attorney at law then residing at Susanville, in said county of Lassen, in which custody said deed remained until about the 7th day of August, 1922, when it was delivered to said Mary C. Hill, and was thereafter, on the 8th day of August, 1922, recorded in the office of the County Recorder of said County of Lassen, in Book 9 of Deeds, at page 266. That Mary C. Hill was not informed prior to the death of said Thomas Hill that said deed

had been made and placed in the custody of said Grover C. Julian.

That these plaintiffs have no actual knowledge and are not informed as to whether any instructions were given to [5] said Julian as to the delivery of said deed; but from the acts and conduct of said Thomas Hill subsequent to the making of said deed which are hereinbefore and hereinafter alleged, plaintiffs allege that it was not the intention of said Thomas Hill that said deed should be delivered to said Mary C. Hill until after his death, and that it was not his intention that said deed should operate to divest him of the title to the lands described therein and to vest the title thereto in said Mary C. Hill until said deed should be delivered to her after his death.

8.

That the plaintiff, Bank of Lassen County, had neither notice nor knowledge of the fact that said deed had been made by said Thomas Hill as aforesaid until after said deed had been delivered to said Mary C. Hill and placed of record as aforesaid, and that said plaintiff would not have extended credit and made loans to said Thomas Hill as hereinbefore set out, had it known of the making of said deed.

9.

Plaintiffs further allege upon information and belief that between the 8th day of January, 1921, and the 9th day of July, 1921 (both days inclusive), said Thomas Hill, in his own name negotiated and agreed with one Mrs. Georgiana F. Lonkey, for the purpose

of certain real and personal property including 680 head of cattle at $40.00 per head; and that said negotiations resulted in a final agreement bearing date July 19, 1921, between Thomas Hill and said Mrs. Lonkey, whereby Mrs. Lonkey agreed to deliver to said Thomas Hill the said cattle, with a bill of sale therefor, and said Thomas Hill agreed to give said Mrs. Lonkey his promissory note for $27,200.00, and to ma*ek*, execute and deliver to her a first mortgage upon said cattle and a second mortgage upon [6] all that certain ranch property acquired by him from M. O. Folsom and L. D. Folsom; and that said ranch property so referred to included all of the lands which are described in said deed made by said Thomas Hill to said Mary C. Hill; and that thereafter, on or about the 10th day of July, 1921, said Thomas Hill made, executed and delivered to said Mrs. Lonkey his note for $27,200.00, and to secure the same made, executed and delivered to said Mrs. Lonkey a mortgage upon said land pursuant to said agreement; and on or about August 18, 1921, Mrs. Lonkey delivered to said Thomas Hill, a bill of sale of said cattle. That said Mrs. Mary C. Hill, as the wife of Thomas Hill, joined in the execution of said mortgage upon said ranch property.

10.

That after the death of said Thomas Hill, to wit, on or about the 20th day of December, 1922, the said Mary C. Hill, widow of said Thomas Hill, and her eleven children who are named in the fourth paragraph of this bill of complaint, made, and delivered

to the defendants John M. Walsh and Thomas A. Kearney, as trustees, a deed of trust and mortgage purporting to convey to said trustees the land hereinbefore particularly described, which deed of trust purported to be given as security for the payment of two promissory notes, one for $8,000.00 payable to the defendant W. M. Kearney, and one for $42,000.00 payable to the defendant Patrick Walsh.

And upon information and belief plaintiffs allege that at the time said deed of trust was delivered to and accepted by the defendants they were fully informed as to the facts and circumstances set forth in paragraph seven of this bill of complaint relative to the making and *deliver* of the deed from Thomas Hill to Mary C. Hill. [7]

11.

That said defendants are now threatening to sell said land at trustee's sale and have advertised that they will sell the same at public auction on the 26th day of April, 1926. A copy of the published notice of said threatened sale is annexed hereto, marked Exhibit "A" and made a part hereof.

And said defendants now claim and assert that said Thomas Hill, at the time of his death, had no right, title or interest in or to said lands; and that the estate of Thomas Hill now has no right, title or interest *ht*erein; and that the creditors of said Thomas Hill, whose claims have been presented, allowed and approved and filed in the matter of the estate of said Thomas Hill, including the plaintiff, Bank of Lassen County, have no right to resort to

said lands or any part thereof for the payment of their said claims. And upon information and belief plaintiffs allege that valid claims against said deceased have been presented, allowed and approved, and now remain wholly unpaid and unsecured, amounting to approximately *to* $17,000.00, besides interest. That the personal property belonging to said estate has been practically all disposed of—the cattle having nearly all been sold to pay the indebtedness to said Mrs. Lonkey of $27,200.00 hereinbefore mentioned and which was secured by a chattel mortgage on said cattle.

That the trust deed mentioned in paragraph ten of this bill of complaint covers all of the land belonging to said estate except about 320 acres of ranch land in said County of Lassen, and 80 acres of unimproved grazing land in Sierra County, California.

That said 320 acres of ranch land in Lassen County consists of four separate parcels of forty acres each, and another separate parcel of 160 acres. That all of said parcels belong to and are part of the main ranch, of which all the rest is conveyed— [8] or attempted to be conveyed—by the deed of trust under which the defendants claim as aforesaid. That if said parcels are separated from the main body of said ranch they will have small value, probably not to exceed $4,000.00. That the title to said 80 acres of land in Sierra County is uncertain, and said land has no known value.

12.

That if said defendants are permitted to sell said land pursuant to their said notice of sale, said defendants Patrick Walsh and W. M. Kearney will not bid any more therefor than the amount of the indebtedness which they claim said deed of trust was given to secure, and they will *asset* that neither these plaintiffs nor any of the creditors of said Thomas Hill, deceased, has any right of redemption from such sale; that a cloud will be case upon the titlte to said land and as a result the plaintiff, Bank of Lassen County, and other creditors of said Thomas Hill, deceased, will be unable to collect their claims against the estate of said deceased, to their great and irreparable injury and damage.

WHEREFORE plaintiffs pray that the defendants and each of them, their attorneys and agents, and all persons acting for them, be restrained and enjoined from making sale of said lands pursuant to said notice of sale, or at all.

And plaintiffs pray that a temporary injunction or restraining order be issued in this action, prohibiting such sale until further order of this Court; and that a citation be issued to said defendants requiring them to show cause why an injunction should not be issued forbidding such sale pending the determination of this action on the merits.

And that a decree be entered adjudging that the claims [9] of the plaintiff, Bank of Lassen County, and all other creditors of the estate of Thomas Hill, deceased, have a lien upon and a right to resort to said real property for their several

claims; and that such lien and right are prior and preferred to any of the rights of the defendants under said deed of trust.

And that plaintiffs have any further, other or different relief to which they may be entitled to in equity.

And that plaintiffs have judgment for their costs herein.

J. E. PARDEE,
Attorney for Plaintiffs.

State of California,
County of Lassen,—ss.

C. H. Bridges, being first duly sworn, says: That he is cashier of Bank of Lassen County, one of the plaintiffs in the foregoing action; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to such matters he believes it to be true.

C. H. BRIDGES.

Subscribed and sworn to before me this 5th day of July, 1927.

[Seal]

J. E. PARDEE,
Notary Public. [10]

EXHIBIT "A."

WHEREAS Mary C. Hill, Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie L. Hill, Jimmie O. Hill, Florence Hill Douglass, Hubert W. Hill, Mil-

dred L. Hill, Christine V. DeForest and Maud B. McGregor, of the county of Lassen, State of California, did execute a certain deed of trust bearing date the 20th day of December, 1922, to Thomas A. Kearney and Patrick Walsh, which deed of trust was recorded in the office of the county recorder of the County of Lassen, State of California, on the 3rd day of January, 1923, in Book C of Trust Deeds, at page 249 et als., to which reference is made for full particulars of its contents; and

WHEREAS default has been made by the said Mary C. Hill, Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglass, Hubert W. Hill, Mildred L. Hill, Christine V. DeForest and Maud B. McGregor in the payment of the interest on the promissory notes secured by said deed of trust, and in the payment of the principal of one of said promissory notes, and the said W. M. Kearney and Patrick Walsh did on the 21st day of September, 1925, demand that said trustees Thomas A. Kearney and John M. Walsh, should forthwith proceed to sell the lands in said deed of trust described and

WHEREAS the mortgagees or beneficiaries have recorded in Lassen County, State of California, pursuant to law, a notice of the breach of said trust deed and of their election to sell or cause to be sold the property specified in said trust deed to satisfy the said obligation which said notice was and has been recorded more than three months prior to the first publication and posting of this notice of sale.

NOW, THEREFORE, pursuant to the said demand, and in accordance with the terms and under the authority of the said deed of trust, [11] the said Thomas A. Kearney and John M. Walsh, as such trustees, do hereby give notice that on Monday, the 26th day of April, 1926, at the hour of 1:00 o'clock in the afternoon of said day, at the county court house, on the front steps of said building, at Susanville, in the County of Lassen, State of California, they will sell at public auction to the highest bidder, for current lawful money of the United States of America, all those certain pieces, parcels, tracts and lots of land situated, lying and being in the County of Lassen, State of California, and particularly described as follows, to wit:

The W.½ of NW.¼, SE.¼ of NW.¼ and the SW.¼ of Section 2; the E.½, SW.¼ S.½ of NW.¼, and the NW.¼ of NW.¼ of Section 3; the E.½, S.½ of SW.¼ and the NE.¼ of SW.¼ of Section 4; the E.½ of NE.¼ and the SE.¼ of Section 8; the N.½, N.½ of SE.¼ and the W.½ of SW.¼ of Section 9; the N.½ of N.½ and the SW.¼ of NW.¼ of Section 10; the W.½, W.½ of E.½ and the E.½ of SE.¼ of Section 11; the NE.¼ of NW.¼ and the W.½ of NE.¼ of Section 14; also a piece of land bounded as follows: Beginning at a point 10 chains west of the corner of Sections 11–12–13 and 14, and running thence South 15 chains; thence South 58 degrees 45 feet West, 11.72 chains to the quarter-quarter line; thence north along said quarter-quarter line 21.10 chains to the line between Sections 11 and 14; thence east 10 chains to the place of

beginning, being in said Section 14, all in Township 31 North, Range 12 East, M. D. M.

Also the SE.¼ of SE.¼ of Section 34, and the W.½ of SW.¼ of Section 35, in Township 32 North, Range 12 East, M. D. M.

Also the N.½ of SW.¼ of Section 2, and the E.½ of SE.¼ of Section 3, in Township 31 North, Range 11 East, M. D. M., containing in all 3,218.58 acres, more or less according to Government Survey.

Together with all water and water rights, ditches and ditch rights, easements and privileges appurtenant and incident thereto or used or useful in connection with the aforesaid premises.

Dated: March 8, 1926.

THOMAS A. KEARNEY.
JOHN M. WALSH.

First pub. April 2.
Last pub. April 23. [12]

State of California,
County of Lassen,—ss.

J. E. Pardee, being first duly sworn, says: That he is attorney for the plaintiffs named in the foregoing amended bill of complaint; that on the 6th day of July, 1927, affiant mailed a copy of said amended bill of complaint in the postoffice at Susanville, properly addressed to W. M. Kearney, one of the attorneys for the defendants in said bill of complaint named, at his office in the Gazette Building, at Reno, Nevada.

J. E. PARDEE.

Subscribed and sworn to before me this 6th day of July, 1927.

[Seal] J. E. PARDEE.
Notary Public.

[Endorsed]: Filed Jul. 7, 1927. [13]

[Title of Court and Cause.]

AMENDED ANSWER TO AMENDED BILL OF COMPLAINT.

Now come the defendants above named and by leave of court first had and obtained file this, their amended answer to the amended bill of complaint, and admit, allege, and deny, as follows, to wit:

I.

The admit the allegations of Paragraph I of the amended bill of complaint.

II.

They admit the allegations of Paragraph II of the amended bill of complaint.

III.

They admit that all the times mentioned in the bill of complaint prior to July 24, 1922, Thomas Hill was a resident of the County of Lassen, State of California, and engaged in farming and stock-raising, and that he was in the actual possession and control of the lands described in the bill of complaint, but [14] they deny that he was at any

time since the 15th day of December, 1917, the holder of the record title to the said land or had any interest therein other than such as is hereinafter in this answer set forth.

IV.

They admit the allegations of Paragraph IV of said bill of complaint.

V.

Defendants admit the allegations of Paragraph V of said amended bill of complaint, and allege that said defendants never knew of any of the said statements so made by the said Thomas Hill to the said plaintiff Bank of Lassen County until the filing of the bill of complaint herein.

VI.

They admit the allegations of Paragraph VI of said bill of complaint, but allege that the said defendants had no knowledge, notice, or information of the fact that the said Thomas Hill had made the said statements to the said plaintiff, or that the said plaintiff relied thereon at any time prior to the filing of the bill of complaint herein.

VII.

They admit and allege that on or about the 15th day of December, 1917, the said Thomas Hill, being then the owner of the land described in the bill of complaint and the title thereto appearing and standing in his name on the records of said county, made, signed, and acknowledged before a notary public a bargain and sale deed purporting to be made for and in consideration of the sum of Ten Dollars

($10.00) and purporting to convey to his wife, Mary C. Hill, the lands described in the bill of complaint. They admit that no valuable consideration passed to the said [15] Mary C. Hill, or any other person in her behalf, to the said Thomas Hill at the time of the making of said deed, or at any time thereafter, but deny that no consideration so passed, and, on the contrary, they allege that the said Mary C. Hill was at the said time the wife of the said Thomas Hill, and the said deed was made in consideration of the love and affection of the said Thomas Hill to the said Mary C. Hill and for her better maintenance and support. They admit that on or about the said 15th day of December, 1917, said deed was by the said Thomas Hill placed in the custody of one Grover C. Julian, an attorney at law, then residing in Susanville, in the County of Lassen, and allege that the said deed was then and there delivered by the said Thomas Hill to the said Grover C. Julian in the presence of said Mary C. Hill, with instructions to hold the same until the death of said Thomas Hill, and to then hand the same to the said Mary C. Hill for recordation, and they admit and allege that the said deed remained in the custody of the said Grover C. Julian for the purpose aforesaid until about the 7th day of August, 1922, when the said Grover C. Julian, in accordance with the said instructions of said Thomas Hill, handed the same to the said Mary C. Hill, the said Thomas Hill having theretofore died, and thereafter, and on or about the 8th day of August, 1922, the said Mary C. Hill recorded the same in

the office of the County Recorder of said County of Lassen, in Book 9 of Deeds, at page 266. They deny that the said Mary C. Hill was not informed prior to the death of said Thomas Hill that said deed had been made and placed in the custody of the said Grover C. Julian, and, on the contrary, they allege that the same was so delivered and placed in the custody of said Grover C. Julian in the presence of the said Mary C. Hill. Defendants allege that the foregoing instructions were given to the said Grover C. [16] Julian as to the said deed, and they deny that it was not the intention of said Thomas Hill that said deed should be delivered to said Mary C. Hill that said deed should be delivered to said Mary C. Hill until after his death, and deny that it was not his intention that said deed should operate to divest him of the title to the lands described therein, or to vest the title thereto in the said Mary C. Hill until said deed should be delivered to her after his death, and, on the contrary, they allege that the said deed was so delivered by the said Thomas Hill to the said Grover C. Julian with the intention to then and there make the same operative and to convey the said property to the said Mary C. Hill, subject to a life estate reserved in the said Thomas Hill.

VIII.

The defendants have no knowledge, information, or belief sufficient to enable them to answer the allegations of Paragraph VIII of said bill of complaint, and basing their denial on that ground they deny the same.

IX.

They admit the allegations of Paragraph IX of said bill of complaint.

X.

They admit and allege that the said Mary C. Hill and her children made, executed, and delivered the deed of trust referred to therein, but they deny that at the time said deed of trust was delivered to and accepted by the defendants they were fully or at all informed as to the facts and circumstances set forth in Paragraph VII of said bill of complaint relative to the making or delivery of the deed from Thomas Hill to Mary C. Hill, or any thereof, except that they ascertained from the records of the County of Lassen that the said deed, dated, acknowledged, and [17] recorded as aforesaid, was of record in the said county, and they were informed by the said Mary C. Hill and her said children that the said deed had been delivered on or about the date thereof to the said Grover C. Julian, with the instructions aforesaid, and that the said Mary C. Hill was the owner of the said property.

XI.

Said defendants admit that at the time of the filing of the bill of complaint herein they were intending and threatening to sell the said land at trustees' sale under said deed of trust, and had advertised that they would sell the same at public auction on the 26th day of April, 1926, and admit that a copy of the public notice of said threatened sale is annexed to said amended bill of complaint,

but they allege and said defendants admit that they claim and assert that the said Thomas Hill at the time of his death had no right, title, or interest in or to said lands other than a life estate which terminated at his death. They admit that they claim and assert that the estate of Thomas Hill now has no right, title or interest therein, and that the creditors of said Thomas Hill have no right to resort to said lands, or any part thereof, for the payment of their said claims. They admit that valid claims against said deceased have been presented, allowed, and approved, and now remain wholly unpaid and unsecured, amounting to approximately $17,000.00 beside interest, but they have no knowledge, information, or belief sufficient to enable them to answer the allegation as to the disposition of the personal property of said estate, and basing their denial on that ground they deny the same. They allege, however, that a large portion of said indebtedness to the said Lonkey was paid by money loaned by these plaintiffs to the said Mary C. Hill, as hereinafter more particularly alleged. Defendants, and each of them, are [18] without sufficient knowledge, information, and belief to enable them to answer as to whether or not said trust deed mentioned in paragraph X of the amended bill of complaint covers all land claimed to belong to said estate, except about 320 acres of ranch land in said County of Lassen and 80 acres of unimproved grazing land in Sierra County, California, and basing their denial on that ground they deny the same. Defendants, however, deny that the land mentioned in said

trust deed belongs to the said estate. Defendants are without sufficient knowledge, information, or belief to enable them to answer the allegation of said bill of complaint that said 320 acres of ranch land consists of four separate parcels of 40 acres each and another separate parcel of 160 acres and another separate parcel of 160 acres, and basing their denial on that ground they deny the same. Defendants are without sufficient knowledge, information, or belief to enable them to answer the allegation of said bill of complaint that all of said parcels belong to and are part of the main ranch, of which all the rest is conveyed or attempted to be conveyed by the deed of trust under which the defendants claim as aforesaid, and basing their denial on that ground they deny the same. Defendants are without sufficient knowledge, information or belief to enable them to answer the allegations of said bill of complaint that if said parcels are separated from the main body of said ranch, they will have small value—probably not to exceed $4,000.00—and that the title to the said 80 acres of land is uncertain, and that said land has no known value, and basing their denial on that ground they deny the same.

XII.

They admit that defendants Patrick Walsh and W. M. Kearney will not bid any more for said property than the amount of the indebtedness which said deed of trust was given to secure, and admit [19] that they will assert that neither of the plaintiffs, nor any of the creditors of Thomas Hill, deceased,

has any right or redemption from such sale, but deny that a cloud will be cast upon the title to said land, and deny, as a result, the plaintiffs, or any other creditors of said Thomas Hill, deceased, will be unable to collect their claims against the estate of said deceased, and deny that they will suffer great and irreparable or any injury or damage, but said defendants allege that the said defendants have already sold the said property pursuant to the terms of said trust deed, but before the said sale they gave the said plaintiffs every opportunity to sell the same at a price in excess of the amount due to the said defendants under said deed of trust.

Further answering said amended bill of complaint and as and for a further and second defense the defendants allege and show to the Court:

I.

That the said plaintiffs and the said Thomas Hill and his estate, and all creditors of his estate, and all persons claiming by, through, and under the said Thomas Hill, are estopped from denying or disputing the due delivery of said deed from the said Thomas Hill to said Mary C. Hill, and in this behalf said defendants allege that the said instrument was prepared by the direction of said Thomas Hill and was signed by him with the knowledge of said Mary C. Hill, and was acknowledged by him in such a manner as to entitle the same to be recorded, and the same was, with the knowledge and in the presence of said Mary C. Hill, placed in the custody of one Grover C. Julian, an attorney at law, with

directions to the said Grover C. Julian to hold the same and upon the death of the said Thomas Hill to hand the same to the [20] said Mary C. Hill to be recorded, and the said Thomas Hill and the said Mary C. Hill thereby placed the said instrument in such a position that the same would in the natural order of events be recorded and become a public record, and the same was so handed to the said Mary C. Hill by the said Grover C. Julian after the death of said Thomas Hill and placed of record as aforesaid.

II.

That the said defendants relied upon the said instrument and the record thereof, and believed that the same was duly delivered, and had no notice, knowledge, or information to the contrary, and believed that the same was so handed to the said Grover C. Julian by the said Thomas Hill with the intent that the same should thereupon become effective and should vest in the said Mary C. Hill an estate in remainder in the said property after the life estate therein of said Thomas Hill, and so relying upon the said instrument and the record thereof and so believing that the same had been duly delivered as aforesaid, the said defendants loaned and advanced to the said Mary C. Hill, on the faith of the said instrument, the said sum of $50,000.00, and at the time of so advancing said money the said defendants had no knowledge, notice, or information in any way disparaging the apparent title of the said Mary C. Hill to the said land, and they ad-

vanced the said money in good faith in reliance upon said title.

III.

That at the said time of the delivery of said deed said Grover C. Julian had no knowledge of any of the statements made by the said Thomas Hill to the said Bank of Lassen County, or to any other person, showing that the said Thomas Hill still claimed to own the said land, notwithstanding the said deed, nor did he at any time know of any such statement, or of any statement, [21] made by the said Thomas Hill until long after the death of the said Thomas Hill and after he had so handed the said deed to the said Mary C. Hill for recordation, and the said Thomas Hill knew that the said Grover C. Julian knew of no statements or acts of said Thomas Hill showing an intention not to deliver the said deed as an effective instrument at the time the same was delivered to the said Grover C. Julian, and well know that the said Grover C. Julian, as an attorney at law, would carry out the instructions which were given to him by the said Thomas Hill and that he would upon the death of said Thomas Hill hand the said deed to the said Mary C. Hill for recordation, and the said Thomas Hill, if he did not in fact intend that the said deed should become effective as aforesaid, was guilty of gross carelessness in so placing the said deed where the same would in the natural course of events be recorded and be relied upon as showing title to the said property in the said Mary C. Hill.

IV.

That by reason of the premises the said defendants were misled to their prejudice by the act of said Thomas Hill, and the said Thomas Hill and his estate and all persons claiming thereunder are barred and estopped from asserting that the said instrument was not so delivered with the intent that the same should become effective.

Further answering said amended bill of complaint and as and for a further and third and separate defense thereto the defendants allege and show to the Court:

I.

That the said Bank of Lassen County, a corporation, is barred and estopped from denying or disputing the due delivery [22] of said deed from said Thomas Hill to Mary C. Hill, and in this behalf defendants allege that at the time of the execution of the promissory notes and deed of trust to the said defendants the said plaintiff Bank of Lassen County knew that the said defendants were about to loan and advance to the said Mary C. Hill the sum of $50,000.00 to be secured by said promissory notes and said deed of trust, and knew that the said defendants were relying upon the title of the said Mary C. Hill in and to the said land and were relying upon the said deed from the said Thomas Hill to the said Mary C. Hill as conveying the title of said land to the said Mary C. Hill.

II.

At the said time, as defendants are now informed

and believe, the said Bank of Lassen County had in its possession certain statements in writing made by the said Thomas Hill and which are set up and referred to in the bill of complaint herein, in which statements said Thomas Hill represented himself to be the owner of the said land, and which statements are now relied upon by the said Bank of Lassen County for the purpose of showing an intent of the said Thomas Hill not to deliver the said deed; that said statements and the existence thereof were entirely unknown to the defendants, and said Bank of Lassen County well knew that the said statements were entirely unknown to defendants, and said plaintiff Bank of Lassen County well knew that the defendants would not loan the said money if they had known of any fact which threw any doubt upon the validity of said deed.

III.

Notwithstanding the premises the said Bank of Lassen County did not inform the defendants of the said statements, or any thereof, nor did it in any way notify the defendants of any fact [23] within its knowledge throwing any doubt upon the vadility of said deed, but concealed the said statements from the defendants.

IV.

That the said plaintiff Bank of Lassen County had full and complete knowledge of the said transaction between the defendants herein and the said Mary C. Hill and her children at the time the same was being negotiated and before and at the consum-

mation thereof on or about the 20th day of December, 1922; that the said defendants communicated with the said plaintiff Bank of Lassen County, a corporation, prior to the making of said loan and the taking of the said trust deed, and the said plaintiff Bank of Lassen County aided in the negotiations for the consummation thereof; that as defendants are informed and believe said plaintiff Bank of Lassen County was instrumental in making the arrangements with said Georgiana F. Lonkey whereby certain of the money to be advanced by the plaintiffs to the said Mary C. Hill would be applied to the satisfaction of said indebtedness, and the mortgage lien of the said Georgiana F. Lonkey on the said land would be released upon the consummation of the said loan by defendants to the said Mary C. Hill of the said $50,000.00 aforesaid; that as defendants are informed and believe the said Bank of Lassen County actually received and held the moneys delivered by defendants to the said Mary C. Hill over and above the amount required to obtain the reconveyance to her of said lands by Richard Kirman and Walter J. Harris and for the purpose of releasing the said Lonkey mortgage; that said plaintiff Bank of Lassen County recommended to defendants the making of the said loan by defendants to the said Mary C. Hill and urged the same, and at the time the said loan was being negotiated and consummated as herein stated said plaintiff Bank [24] *Bank* of Lassen County made no claim whatever to defendants of, in or to any rights, liens, or interest in said land and premises,

nor did plaintiff Bank of Lassen County mention or relate to defendants, or either of them, any of the facts alleged in the amended bill of complaint herein, notwithstanding that plaintiff Bank of Lassen County now claims to have then had knowledge thereof and remained quiet when the defendants paid over and loaned the said money aforesaid.

V.

That by reason of the representations made to the defendants herein by the said Bank of Lassen County, and by reason of its failure to inform the defendants of the facts within its knowledge, and set forth in its bill of complaint, the said Bank of Lassen County is barred and estopped from relying upon any of the said facts in order to show that it was not the intent of the said Thomas Hill to deliver the said deed or as showing that the said Thomas Hill did not intend that the said deed should be effective, and it would be against equity and good conscience to permit the plaintiff Bank of Lassen County to use any of the said facts, or by reason thereof, to deny that the said Mary C. Hill is and was the owner of said property at the time the said defendants loaned the said money to her and took the said promissory notes and deed of trust from her.

VI.

That by reason of the premises the said Bank of Lassen County is barred and estopped from claiming any part of the proceeds of the sale of the said land in order to satisfy its claim against

the said Thomas Hill until the defendants herein have been fully paid for their advances to the said Mary C. Hill as aforesaid. [25]

Further answering said amended bill of complaint and by way of cross-complaint against the plaintiffs above named defendants allege and show to the Court:

I.

That the defendants John M. Walsh, Thomas A. Kearney, W. M. Kearney, and Patrick Walsh, were at the time of the commencement of this suit citizens and residents of the State and District of Nevada, and the said defendants W. M. Kearney and Patrick Walsh are now citizens and residents of the State and District of Nevada, but since the filing of the bill of complaint herein and since the sale of the lands in the trust deed hereinafter mentioned, both trustees, Thomas A. Kearney and John M. Walsh, died, and Patrick Walsh & Sons, Inc., a corporation, was substituted herein in their place and stead.

II.

That the plaintiff Bank of Lassen County is a corporation organized and existing under and by virtue of the laws of the State of California and is a citizen and resident of the State of California and of the Northern Division of the Northern District of California, and the plaintiff Mary C. Hill, as administratrix of the Estate of Thomas Hill, Deceased, is a citizen and resident of the State of California and of the Northern Division of the Northern District of California.

III.

That the matter in controversy in this suit, exclusive of interests and costs, exceeds the sum of $3,000.00.

IV.

That on the 25th day of May, 1923, Mary C. Hill was, by an order and decree of the Superior Court of the State of [26] California, in and for the County of Lassen, duly appointed administratrix of the Estate of Thomas Hill, Deceased, thereafter duly qualified as such, and is now and at all times after said date has been the duly qualified and acting administratrix of the Estate of Thomas Hill, Deceased.

V.

That the said Patrick Walsh & Sons, Incorporated, a corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada and is a citizen and resident of the State of Nevada.

VI.

That prior to any of the times herein mentioned the said Thomas Hill and the said Mary C. Hill were husband and wife, and the said Thomas Hill was the owner in fee, in the possession and entitled to the possession of those certain lots, pieces and parcels of land situate, lying and being in the County of Lassen, State of California, and more particularly bounded and described as follows, to wit:

The W.½ of NW.¼, SE.¼ of NW.¼ and the SW.¼ of Section 2; the E.½, SW.¼, S.½

of NW.¼ and the NW.¼ of NW.¼ of Section 3; the E.½, S.½ of SW.¼ and the NE.¼ of SW.¼ of Section 4; the E.½ of NE.¼ and the SE.¼ of Section 8; the N.½ of N.½ of SE.¼ and W.½ of SW.¼ of Section 9; the N.½ of N.½ and SW.¼ of NW.¼ of Section 10; the W.½, W.½ of E.½ and the E.½ of SE.¼ of Section 11; the NE.¼ of NW.¼ and the W.½ of NE.¼ of Section 14; also a piece of land bounded as follows: Beginning at a point 10 chains west of the corner of Sections 11–12–13 and 14 and running thence South 15 chains; thence South 58° 45′ West, 11.72 chains to the quarter-quarter line; thence north along said quarter-quarter line 21.10 chains to the line between Sections 11 and 14; thence east 10 chains to the place of beginning, being in said Section 14, all in Township 31 North, Range 12 East, M. D. M.;

Also the SE.¼ of SE.¼ of Section 34, and the W.½ of SW.¼ of Section 35, in Township 32 North, Range 12 East M. D. M.;

Also the N.½ of SW.¼ of Section 2, and the E.½ of SE.¼ of Section 3, in Township 31 North, Range 11 East, M. D. M., containing in all 3,218.58 acres, more of less according to Government Survey. [27]

VII.

That on the 15th day of December, 1917, the said Thomas Hill signed and executed a deed conveying all of the said property to his said wife, Mary C.

Hill, and thereupon on the said 15th day of December, 1917, duly acknowledged the same before a notary public in and for the said county and state, duly authorized to take such acknowledgments, and thereupon delivered the said instrument in the presence of the said Mary C. Hill to one Grover C. Julian with instructions to hold the same until the death of the said Thomas Hill, and then hand the same to the said Mary C. Hill, and said defendants are informed and believe and on such information and belief allege that the said deed was on the said 15th day of December, 1917, duly delivered by the said Thomas Hill to the said Mary C. Hill in the manner aforesaid and with the intent and purpose that title to the said property should vest in the said Mary C. Hill, subject to a life estate in the said Thomas Hill. A copy of the said deed is hereunto annexed, marked "Exhibit A" and made a part hereof.

VIII.

Thereafter the said Thomas Hill died, and thereupon and on or about the 8th day of August, 1922, the said Grover C. Julian handed the said deed to the said Mary C. Hill and she recorded the same on the 8th day of August, 1922, at thirty minutes past two o'clock P. M. in the office of the County Recorder of the said county and state, and the same was thereupon recorded in Book 9 of Deeds at page 266. Thereafter and on or about the 20th day of December, 1922, the defendants, W. M. Kearney and Patrick Walsh loaned and advanced to the

said Mary C. Hill the sum of $50,000 evidenced by two certain promissory notes executed by said Mary C. Hill and her children, Mrs. Sadie Case, Cleve [28] Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglas, Hubert W. Hill, Mildred L. Hill, Christine V. DeForest, and Maud B. McGregor, in words and figures following, to wit:

"$8,000.00. Reno, Nevada,
December 20th, 1922.

One year after date, without grace, for value received, we, or either of us, promise to pay to W. M. Kearney, or order, at Reno, Nevada, the sum of Eight Thousand Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of eight per cent. per annum from date until paid. Interest payable semi-annually, also after judgment.

The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker or makers thereof, or either of them. In the event of the non-payment of this said note at maturity, or at its collection by suit, we, or either of us, agree to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end bind ourselves, our heirs, executors, administrators and assigns forever. For

the purpose of attachment or levy of execution, this note shall be payable wherever we, or either of us, may be situated, at the option of the holder.

MARY C. HILL.
MRS. SADIE CASE.
CLEVE HILL.
JOSEPH HILL.
ROBERT ELMER HILL.
THOMAS GAY HILL.
LAWRENCE HILL.
JESSIE I. HILL.
JIMMIE O. HILL.
FLORENCE HILL DOUGLAS.
HUBERT W. HILL.
MILDRED L. HILL.
CHRISTINE V. DeFOREST.
MAUD B. McGREGOR.
By MARY C. HILL,
Their Attorney-in-fact.

(1.60 Documentary Stamps cancelled.)"

"$42,000.00. Reno, Nevada.
December 20th, 1922.

Three years after date, without grace, for value received, we, or either of us, promise to pay to Patrick Walsh, or order, at Austin, Nevada, the sum of Forty-two Thousand Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of eight per cent per annum from date until paid. Interest payable semi-annually, also after judgment.

The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest

and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker or makers thereof, or either of them. In the event of the non-payment of this said note at maturity, or [29] its collection by suit, we, or either of us, agree to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end bind ourselves, our heirs, executors, administrators, and assigns forever. For the purpose of attachment by levy or execution, this note shall be payable wherever we, or either of us, may be situated, at the option of the holder.

MARY C. HILL.
MRS. SADIE CASE.
CLEVE HILL.
JOSEPH HILL.
ROBERT ELMER HILL.
THOMAS GAY HILL.
LAWRENCE HILL.
JESSIE I. HILL.
JIMMIE O. HILL.
FLORENCE HILL DOUGLAS.
HUBERT W. HILL.
MILDRED L. HILL.
CHRISTINE V. DeFOREST.
MAUDE B. McGREGOR.
By MARY C. HILL,
Their Attorney-in-fact."

IX.

That at the time of the delivery of the said notes and the payment of said sum, and to secure the payment of the said principal sum and the interest thereon, as mentioned in said notes, the said Mary C. Hill and her said children duly executed and delivered to their defendants, John M. Walsh and Thomas A. Kearney, as trustees, their deed of trust bearing date the 20th day of December, 1922, conveying unto them the land and premises above described. A copy of said deed of trust is attached hereto, marked Exhibit "B" and made a part hereof.

X.

The said trust deed was duly acknowledged so as to entitle it to be recorded, and on the 3d day of January, 1923, the same was duly recorded in the office of the County Recorder of Lassen County, California, in Book C of Trust Deeds at page 249 and following. [30]

XI.

That at and prior to the time that the said defendants so advanced and loaned the said sum of money to the said Mary C. Hill the said land above described was subject to certain liens created thereon by the said Thomas Hill and Mary C. Hill, to wit:

(1) On or about the 15th day of December, 1917, the said Thomas Hill and the said Mary C. Hill borrowed the sum of $30,000 from Farmers & Merchants National Bank of Reno, Nevada, and, in order to secure the payment thereof, together

with interest on $15,000 thereof at eight per cent per annum, and on $15,000 thereof at seven per cent per annum, made, executed and delivered to Richard Kirman and Walter J. Harris a deed of trust by which the said property was conveyed to the said Richard Kirman and Walter J. Harris in trust, which said deed of trust was thereafter on the 15th day of December, 1917, duly recorded in the office of the County Recorder of the County of Lassen, State of California, in Book B of Deeds at page 500 and following; and at the time the defendants so loaned and advanced the said money to the said Mary C. Hill the principal and interest due on the indebtedness referred to in the said deed of trust was unpaid and the said land was subject to a lien therefor.

(2) On or about the 10th day of July, 1921, the said Thomas Hill and the said Mary C. Hill borrowed the sum of $27,200 from one Georgiana F. Lonkey, and made, executed and delivered to said Georgiana F. Lonkey a mortgage upon the said land to secure the payment of the sum of $27,200 on the 10th day of July, 1923, together with interest at six per cent per annum, which mortgage was duly recorded in the office of the Recorder of the County of Lassen, State of California, on the 23d day of August, 1921, in Book R of Mortgages at page 193 and following. At the time the said defendants so loaned the said money to the said Mary C. Hill the indebtedness secured by the said mortgage and recited therein was unpaid, and the said

property was subject to the lien of the said mortgage.

XII.

That the said Mary C. Hill requested the defendants herein to advance and loan to her the said sum of money so loaned by the said defendants to her for the express purpose of paying and discharging the said liens upon the said land, and the said defendants so loaned and advanced the said money for the express purpose of paying and discharging the said liens, and the said defendants, [31] themselves, at the direction of the said Mary C. Hill, saw to it that the said money was applied to discharge the said liens and the said indebtedness; and thereupon the said defendants did, under the direction of the said Mary C. Hill, apply the said money so loaned by them to her upon said indebtedness as follows: They paid to the said Richard Kirman and Walter J. Harris on the principal and interest due upon the said indebtedness secured by the said deed of trust to said Richard Kirman and Walter J. Harris the sum of $32,050, and the same was received by the said Richard Kirman and Walter J. Harris in satisfaction of the said indebtedness, and thereupon the said Richard Kirman and Walter J. Harris reconveyed all the right, title, interest and estate in and to the said property which they obtained by the said deed of trust to the said Mary C. Hill. The said defendants paid to the said Georgiana F. Lonkey the sum of $14,800 upon the principal and interest due to the said Georgiana F. Lonkey and evidenced by the said

mortgage and secured thereby. In consideration of the said payment to the said Georgiana F. Lonkey, the said Georgiana F. Lonkey released the said land from the lien of the said mortgage, and duly recorded in the office of the Recorder of the County of Lassen, State of California, a release of the said land from said mortgage.

XIII.

At the time that the said defendants so loaned the said money to the said Mary C. Hill they believed that the said Mary C. Hill was the owner in fee of the said property and that the said deed from the said Thomas Hill to Mary C. Hill was duly delivered to her, and believed and intended that by the said deed of trust so executed by the said Mary C. Hill to the defendants they would obtain and did obtain a first and valid lien upon the fee-simple title to the said land, and the said Mary C. Hill likewise [32] believed and represented to the defendants that she was the owner in fee of the said land and that the said defendants would acquire a first lien on the fee-simple title to the said land.

XIV.

Notwithstanding the premises, the said plaintiff Mary C. Hill thereafter and on or about the 25th day of May, 1923, had herself appointed administratrix of the estate of Thomas Hill, deceased, and thereupon the said Mary C. Hill and the other plaintiff herein claimed that the said Thomas Hill was the owner of the said land and the said plaintiffs ever since said time have threatened to convey

the said land as the property of the said Thomas Hill and his estate; that the claims of the said plaintiffs and any conveyance made by them of the said property as the property of the said Thomas Hill or his estate will create a cloud upon the said property and the title of defendants thereto.

XV.

Defendants hereby incorporate herein all of the allegations set forth in their foregoing further and second defense with the same force and effect as if the same were set forth herein in full.

XVI.

Said defendants hereby incorporate herein all of the allegations set forth in their foregoing third and separate defense with the same force and effect as if the same were set forth herein in full.

XVII.

The said defendants W. M. Kearney and Patrick Walsh have ever since been the owners and holders of the said promissory notes set forth herein, and no part of the principal or interest due thereon has ever been paid. [33]

XVIII.

Since the commencement of this action, the said indebtedness being entirely unpaid, the said John M. Walsh and Thomas A. Kearney, as trustees under the said deed of trust, sold all of the said property in accordance with the provisions of the said deed of trust and at the sale thereof the said Patrick Walsh & Sons Incorporated, a corporation,

made the highest and best bid for the said property and purchased the same for the amount due on the said indebtedness, less the sum of $5,000 which is still due and unpaid. Thereupon, the said trustees, in pursuance of the terms of the said deed of trust, duly conveyed the said property to the said Patrick Walsh & Sons Incorporated, a corporation, and it ever since has been and now is the owner thereof, and all adverse claims of the plaintiffs thereto are without right. The said Patrick Walsh & Sons Incorporated, is a corporation formed and controlled by the said Patrick Walsh, and all the stock thereof is owned or controlled by him, and defendants W. M. Kearney and Patrick Walsh received no money whatever upon said sale, and the said corporation holds the said land for their use and benefit.

XIX.

That the defendants and cross-complainants have no plain, speedy, or adequate remedy in the ordinary course of law.

WHEREFORE, defendants pray:

1. That it be adjudged that the plaintiffs and the estate of Thomas Hill, deceased, have no right, title, interest or estate in or to the said property, and that they be enjoined and restrained from conveying or encumbering the same as the property of Thomas Hill or of his estate, and that the title of defendants to the said property be quieted against the said plaintiffs.

2. That, if it should be held that the said defendants [34] failed to obtain a valid first lien on the

fee-simple title to the said property by the said deed of trust, Exhibit "B," they be subrogated to the said liens of the said Richard Kirman and Walter J. Harris and the said Georgiana F. Lonkey.

3. That it be adjudged that the plaintiffs and the said Thomas Hill and his estate are estopped from denying the delivery of the said deed, Exhibit "A," and the title of the said Mary C. Hill and the validity of the said deed of trust, Exhibit "B."

4. That, if it should be held by the court that the said defendants are not the owners of the said property, but that they are entitled to be subrogated to the said liens of Richard Kirman and Walter J. Harris and Georgiana F. Lonkey, that the Court order said property to be sold, and that the same be sold under the direction of the Court, and that the proceeds of the said sale be applied and paid to the defendants in discharge of the amount advanced by them upon the said liens, together with interest thereon, and that any balance thereof be paid to the plaintiffs.

5. That, if it should be held by the Court that the said defendants are not the owners of the said property, it be adjudged that any right or title in or to the said property to which the said Mary C. Hill might be or become entitled as heir at law of said Thomas Hill, deceased, be declared to be subject to the said deed of trust, Exhibit "B"; and that any money to which the said Mary C. Hill might otherwise be or become entitled by reason of the sale of the said property in the matter of the

estate of Thomas Hill, deceased, be declared to be subject to the said deed of trust, Exhibit "B."

6. That, if it should be held by the Court that the said defendants are not the owners of said property, it be adjudged that any money to which the Bank of Lassen County might otherwise [35] be or become entitled by reason of the sale of said property in the Matter of the Estate of Thomas Hill, Deceased, be declared to be held in trust for the defendants and be declared to be subject to the said deed of trust, Exhibit "B."

7. That, if it should be held by the Court that the said sale of said property did not pass title to said property to defendant Patrick Walsh & Sons Incorporated, the said sale be vacated and set aside.

8. That the defendants recover their costs of suit herein, and for such other and further relief as may be meet in the premises and agreeable to equity.

TREADWELL, VAN FLEET & LAUGHLIN,

N. J. BARRY,

W. M. KEARNEY,

Solicitors for Defendants. [36]

EXHIBIT "A."

THIS INDENTURE, made this 15th day of December, 1917, BETWEEN Thomas Hill of Lassen County, California, the party of the party of the first part, and MARY C. HILL, his wife of the same County and State, the party of the second part:

WITNESSETH: That the said party of the first part, for and in consideration of the sum of Ten ($10.00) Dollars, lawful money of the United States to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, and to her heirs and assigns forever, all those certain lots, pieces and parcels of land, situate in the County of Lassen, State of California, and described as follows, to wit:

The W. ½ of NW. ¼, SE. ¼ of NW. ¼ and the SW. ¼ of Section 2; The E. ½, SW. ¼, S. ½ of NW. ¼ and the NW.¼ of NW. ¼ of Section 3; the E.½ S.½ of SW.¼ and the NE.¼ of SW. ¼ of Section 4; the E. ½ of NE. ¼ and the SE. ¼ of Section 8; the N. ½, N. ½ of SE. ¼ and the W. ½ of SW.¼ of Section 9; The N. ½ of N. ½ and the SW. ¼ of NW. ¼ of Section 10; the W. ½, W. ½ of E. ½ and the E. ½ of SE. ¼ of Section 11; the NE. ¼ of NW. ¼ and the W. ½ of NE. ¼ of Section 14; also a piece of land bounded as follows: Beginning at a point 10 chains west of the corner of Sections 11–12–13 and 14, and running thence south 15 chains; thence south 58 degrees 45′ West 11.72 chains to the quarter-quarter line; thence north along said quarter-quarter line 21.10 chains to the line between Sections 11 and 14; thence east 10 chains to the place of beginning, being in Section 14, all of said land above described being in Township 31 North of Range 12 East, M. D. M.

Also the SE. ¼ of SE. ¼ of Section 34, and the

W. ½ of SW. ¼ of Section 35, in Township 32 North of Range 12 East, M. D. M. [37]

Also the N. ½ of SW. ¼ of Section 2, and the E. ½ of SE. ¼ of Section 3, in Township 31 North of Range 11 East, M. D. M.

Containing in all 3,218.58 acres of land, more or less according to Government Survey.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all the water and water rights incident thereto, and the rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises, with the appurtenances, unto the said party of the second part, her heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

THOMAS HILL.

(Ninety-five Dollars Documentary Stamps affixed and cancelled.)

State of California,
County of Lassen,—ss.

On this 15th day of December, in the year One Thousand Nine Hundred and Seventeen, before me, Alcesta Lowe, a Notary Public, in and for the County of Lassen, personally appeared Thomas Hill, known to me to be the person whose name is subscribed to the within instrument, and he duly acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal at my office in the County of Lassen, the day and year in this certificate first above written.

[Seal] ALCESTA LOWE,
Notary Public in and for the Co. of Lassen, State of California.

[Endorsed]: Recorded at the request of Cleveland Hill Aug. 8, 1922, at 30 min. past 2 o'clock P. M., at page 266 in Book 9 of Deeds, Lassen County Records.

C. L. RAMSEY,
Recorder.
By Grace B. Ramsey,
Deputy. [38]

EXHIBIT "B."

THIS DEED OF TRUST, made and entered into this 20th day of December, A. D. 1922, between MARY C. HILL, a widow, and MRS. SADIE CASE, CLEVE HILL, JOSEPH HILL, ROBERT ELMER HILL, THOMAS GAY HILL, LAWRENCE HILL, JESSIE I. HILL, JIMMIE O. HILL, FLORENCE HILL DOUGLASS, HUBERT W. HILL, MILDRED L. HILL, CHRISTINE V. DeFOREST and MAUD B. McGREGOR by MARY C. HILL, their attorney-in-fact under power of attorney, all of Lassen County, State of California, parties of the first part, and Thomas A. KEARNEY of Reno, Washoe County, Nevada, and JOHN M. WALSH of Austin, Lander County,

Nevada, parties of the second part, and PATRICK WALSH, of Austin, Lander County, Nevada, and W. M. KEARNEY, of Reno, Washoe County, Nevada, parties of the third part,

WITNESSETH:

That the said parties of the first part have granted, bargained, sold and *convey,* and do hereby grant, bargain, sell and convey, unto the parties of the second part, in joint tenancy, and to the survivor of them, their successors and assigns, all that certain real property situated in the County of Lassen, State of California, and described as follows:

The W. ½ of NW. ¼, SE. ¼ of NW. ¼ and the SW. ¼ of Section 2; the E. ½, SW. ¼, S. ½ of NW. ¼ and the NW. ¼ of NW. ¼ of Section 3; the E. ½, S. ½ of SW. ¼ and the NE. ¼ of SW. ¼ of Section 4; the E. ½ of NE. ¼ and the SE. ¼ of Section 8; the N. ½, N. ½ of SE. ¼ and the W. ½ of SW. ¼ of Section 9; the N. ½ of N. ½ and the SW. ¼ of NW. ¼ of Section 10; the W. ½, W. ½ of E. ½ and the E. ½ of SE. ¼ of Section 11; the NE. ¼ of NW. ¼ and the W. ½ of NE. ¼ of Section 14; also a piece of land bounded as follows: Beginning at a point 10 chains west of the corner of Sections 11–12–13 and 14, and running thence South 15 chains; thence South 58° 45′ West, 11.72 chains to the quarter-quarter line; thence north along said quarter-quarter line 21.10 chains to the line between Sections 11 and 14; thence east 10 chains to the place of beginning, being in said Section 14, all in Township 31 North, Range 12 East, M. D. M. [39]

Also the SE. ¼ of SE. ¼ of Section 34, and the

W. ½ of SW. ¼ of Section 35, in Township 32 North, Range 12 East, M. D. M.

Also the N. ½ of SW. ¼ of Section 2, and the E. ½ of SE. ¼ of Section 3, in Township 31 North, Range 11 East, M. D. M., containing in all 3,218.58 acres, more or less according to Government Survey.

TOGETHER with all water and water rights, ditches and ditch rights, easements and privileges appurtenant and incident thereto or used or useful in connection with the aforesaid premises.

Together with all and singular, the tenements, hereditaments and appurtenances thereto belonging, or hereafter to be placed thereon, or in anywise appertaining; and, also all the estate, right, title and interest, or other claim or demand, as well in law as in equity, which the parties of the first part now have, or may hereafter acquire of, in or to the said premises, or any part thereof, with the appurtenances, hereby abandoning all right of homestead in and to said premises and hereby expressly waiving any and all equity of redemption and agreeing to warrant and defend the title to the same.

TO HAVE AND TO HOLD unto the said parties of the second part, as joint tenants, with the right of survivorship, as such, their successors and assigns, IN TRUST, NEVERTHELESS, for the uses and purposes hereinafter limited and described; namely:

This Deed of Trust, however, is intended as a deed of trust and mortgage to secure the payment

of two promissory notes in the words and figures, following, to wit:

"$8,000.00. Reno, Nevada,
December 20th, 1922.

McDow x x "One year after date, without grace, for value received, we, or either of us, promise to pay to W. M. Kearney, or order, at Reno, Nevada, the sum of Eight Thousand Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of eight per cent. per annum from date until paid. Interest payable semi-annually, also after judgment. [40]

"The endorsers, sureties, guarantors and assignors severally waive presentation for payment, protest and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker or makers thereof, or either of them. In the event of the non-payment of this said note at maturity, or its collection by suit, we, or either of us, agree to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end bind ourselves, our heirs, executors, administrators and assigns forever. For the purpose of attachment or levy of execution, this

note shall be payable wherever we, or either of us, may be situated, at the option of the holder.

"MARY C. HILL.
"MRS. SADIE CASE.
"CLEVE HILL.
"JOSEPH HILL.
"ROBERT ELMER HILL.
"THOMAS GAY HILL.
"LAWRENCE HILL.
"JESSIE I. HILL.
"JIMMIE C. HILL.
"FLORENCE HILL DOUGLASS.
"HUBERT W. HILL.
"MILDRED L. HILL.
"CHRISTINE V. DeFOREST.
"MAUDE B. McGREGOR.
"By MARY C. HILL,
"Their Attorney-in-fact."

($1.60 Documentary Stamps cancelled.)

"$42,000.00 Reno, Nevada,
December 20th, 1922.

McDow x x "Three years after date, without grace, for value received, we, or either of us, promise to pay to PATRICK WALSH, or order, at Austin, Nevada, the sum of Forty-two Thousand Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of eight per cent. per annum from date until paid. Interest payable semi-annually, also after judgment.

"The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, pro-

test and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker or makers thereof, or either of them. In the event of the non-payment of this said note at maturity, or its collection by suit, we, or either of us, agree to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end bind ourselves, our heirs, executors, administrators and assigns forever. For the purpose of attachment or levy of execution, this note shall be payable wherever we, or either of us, may be situated, at [41] the option of the holder.

"MARY C. HILL.
"MRS. SADIE CASE.
"CLEVE HILL.
"JOSEPH HILL.
"ROBERT ELMER HILL.
"THOMAS GAY HILL.
"LAWRENCE HILL.
"JESSIE I. HILL.
"JIMMIE O. HILL.
"FLORENCE HILL DOUGLASS.
"HUBERT W. HILL.
"MILDRED L. HILL.
"CHRISTINE V. DeFOREST.
"MAUD B. McGREGOR.
"By MARY C. HILL,
"Their Attorney-in-fact."

To secure the payment to the said parties of the third part, of the sum of Eight Thousand Dollars

($8,000.00) and Forty-two Thousand Dollars ($42,-000.00), respectively, lawful money of the United States of America, and interest thereon according to the terms of the two promissory notes set forth herein, made, executed and delivered by the said parties of the first part and payable to the order of the said parties of the third part respectively; also, to secure the payment of any and all sums of money, checks, bills, promissory notes, bonds, liens, balances of account, overdrafts or other indebtedness, which are now, or may hereafter during the continuance of this trust, be, or become due or owing from the parties of the first part, or either of them, to the said parties of the third part, or for which said parties of the first part, or either of them, may be, or shall become in any manner liable to the said parties of the third part, together with interest on all of such indebtedness, from the date and creation of the same to the date of the repayment to the said parties of the third part, at the rate of eight per cent per annum on all such indebtedness, or such other rate as may be agreed upon where the indebtedness is evidenced [42] by an instrument in writing. Also, to secure the repayment, on demand, of any sum, or sums, advanced at any time during the continuance of this trust by the party of the third part, for the payment of any taxes, assessment, liens or encumbrances now subsisting or which may hereafter be levied or imposed upon said premises, or any part thereof, which may, in the judgment of the parties of the third part, affect said premises or this trust. Also, to secure the repayment, on

demand, of any and all sums paid out by the parties of the second part or third part, in intervening in, prosecuting or defending any action or proceeding, wherever, in their judgment, it may be necessary to do so, in order to protect the title to said property or this trust. Also, to secure the repayment by parties of the first part, of the expenses incurred for such repairs or prevention of waste upon said premises as may have been deemed necessary by parties of the third part, or their successors or assigns. Also, to secure the payment of interest on all of said advances and expenses from the time they are made or incurred to the time of repayment, at the rate of eight per cent per annum, payable semi-annually, after the 20th day of December, 1922, or such other rate as may be expressly agreed upon in writing.

All indebtedness and advances not *evidence* by any instrument in writing wherein it is otherwise provided and the interest thereon, shall be due and payable, on demand, in lawful money of the United States of America.

The parties of the first part have full notice that the parties of the second part are relatives of the parties of the third part, and hereby consent that they act as trustees and parties of the second part, and waive all objections thereto. The parties of the first part shall be entitled only to [43] notice of the names and addresses of any substituted trustee or trustees at the time or after substitution is made, and hereby consent to this provision.

In case the parties of the first part shall well and truly pay, or cause to be paid at maturity, to the parties of the third part, or their successors or assigns, in lawful money as aforesaid, the promissory notes, and all other indebtedness hereinafore mentioned, when the same shall become due, with interest as hereintofore specified, and all sums paid out and expended, together with interest, on demand, as hereinbefore provided, then the parties of the second part, the survivor of them, their successors and assigns, shall reconvey all the estate in said premises, to them by this instrument granted, to the parties of the first part, their heirs or assigns, at their request and cost.

If default shall be made in the payment of said notes first mentioned, or any portion thereof, or any installment of interest thereon when due, or any indebtedness evidenced by any instrument in writing, as aforesaid, or in the reimbursement of any moneys, as herein provided to be paid out and expended, or any advances for taxes, liens, encumbrances, etc., or any other sum due to parties of the third part, with the interest thereon, on demand, as hereinabove expressed, then it shall be lawful for the said parties of the second part, or the survivor of them, their successors or assigns, on the application of the parties of the third part, or their successors or assigns, to sell the above granted premises, or such part thereof, as in their discretion, they shall find it necessary to sell in order to accomplish the objects of this trust, in the manner following, to wit: [44]

They shall publish notice of the time and place of such sale, with a description of the property to be sold, at least one time a week for three successive weeks, in some newspaper, published in the County of Lassen, State of California, and may from time to time, postpone such sale by publication, and on the day of sale so advertised, or to which such sale may be postponed, at the place named, they may sell the property so advertised, as a whole or in subdivisions, as the parties of the second and third part may deem best, at public auction, in any county where any part of said property may be situated, in the State of California, to the highest bidder for cash, in lawful money of the United States of America; and at such sale the holder of any note or instrument in writing, or of any of the indebtedness, or anyone who has made any of the advances hereinbefore mentioned, or the parties of the third part, may bid and purchase the whole or any part of said premises.

And the parties of the second part, or the survivor of them, their successors or assigns, are hereby authorized to execute and shall execute, and after due payment, made, shall deliver to the purchaser or purchasers, at such sale, deed or deeds of grant, for the property sold, and in any such deed, are authorized to recite any and every matter of fact necessary to authorize such sale and deed and such *sale and deed and such* recital shall be conclusive evidence against parties of the first part of the existence of the matters so recited and of every other matter or fact necessary, to authorize such sale,

whether such matter or fact is recited in such deed or not, and any such deed or deeds, with such recitals therein, shall be effectual and conclusive against said parties of the first part, their heirs and assigns, and all other persons. And the receipt for the purchase [45] money contained in any deed executed to a purchaser at such sale, as aforesaid, shall be sufficient discharge of such purchaser from all obligation to see to the proper application of the purchase money according to this trust.

Out of the proceeds of such sale, the parties of the second part shall:—

FIRST: Pay the expenses of sale, including the cost of publication and counsel fee of an amount equal to five (5) per cent of the amount due and remaining unpaid, in lawful money of the United States of America, which shall become due upon any default made by the parties of the first part, in any of the payments aforesaid. And, also such sums, if any, as the parties of the second part, or the parties of the third part, shall have paid or become liable to pay for procuring an abstract, or continuation thereof, or certificate, or report of the title to said real property, or any portion thereof, subsequent to the execution of this deed of trust.

SECOND: They shall retain a sufficient sum to discharge all the indebtedness and interest due from parties of the first part to the parties of the third part, or their successors or assigns, as hereinbefore specified; and all sums which may have been advanced or expenses incurred by parties of the third part, or parties of the second part, for any of the

purposes hereinbefore specified, with the interest thereon, and apply the same in pursuance of this trust, to wit: eight-fiftieths (8/50) to W. M. Kearney, his heirs, successors or assigns, and forty-two fiftieths (42/50) to Patrick Walsh, his heirs, successors or assigns, such representing their respective interests therein.

THIRD: The surplus, if any, they shall pay to the parties of the first part, their successors or assigns, on demand. [46]

IT IS EXPRESSLY COVENANTED that the parties of the third part, may from time to time, appoint other trustee or trustees, to execute the trusts hereby created; and upon such appointment and a conveyance to them, by the parties of the second part, the survivor of them, their successors or assigns, the new trustees shall be vested with all the title, interest, power, duties and trusts in the premises hereby vested in or conferred upon the parties of the second part. Such new trustees shall be considered the successors and assigns of the parties of the second part, within the meaning hereof.

The parties of the second part, or the parties of the third part, may commence, prosecute, intervene in, or defend any action or proceeding in any court of competent jurisdiction, whenever, in their judgment, it may be necessary to do so, in order to protect the title to said property, and may at any time, at their option, commence and maintain suit in any court of competent jurisdiction to obtain the aid and direction of said court in the execution by them of the trusts, or any of them herein ex-

pressed or contained, and may in such suit obtain orders or decrees, interlocutory or final, of said court, directing the execution of said trusts, and confirming and approving their acts, or any of them, or any sales or conveyances made by them, and adjudging the validity thereof, and directing that the purchasers of the lands and premises sold and conveyed be let into immediate possession thereof, and providing for orders of court or other process, requiring the sheriff of the county in which said lands and premises are situated to place and maintain the said purchasers to quiet and peaceable possession of the lands and premises so purchased by them, and the whole thereof.

In case default be made in the payment of any sum or [47] sums hereinabove mentioned, the trustees, their successors or assigns, shall be entitled at any time, at their option, and either by themselves, or by their duly authorized agent, to enter upon and take possession of the above granted premises, or any part thereof, and remove all persons therefrom, and to do an*y* perform such acts of repair or cultivation, as may be necessary or proper to conserve the value thereof, and to collect and receive the rents, issues and profits thereof, and apply the same in the manner hereinbefore specified in respect of proceeds of sale of said premises, and to do such other acts and to exercise such other power in respect to said premises as said trustees may deem necessary or proper to conserve the value thereof, and the expenses therein incurred shall be deemed

to be a portion of the expense of this trust, and secured thereby as hereinbefore provided.

The trustees may at any time, upon request of the parties of the third part, reconvey to the grantors, their heirs or assigns, any portion of said premises without affecting the personal liability of any person, or the payment of any of said indebtedness and without affecting the title to the remaining premises.

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals the day and year first above written.

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals the day and year first above written.

MARY C. HILL. (Seal)
MRS. SADIE CASE. (Seal)
CLEVE HILL. (Seal)
JOSEPH HILL. (Seal)
ROBERT ELMER HILL. (Seal)
THOMAS GAY HILL. (Seal)
LAWRENCE HILL. (Seal)
JESSIE I. HILL. (Seal)
JIMMIE O. HILL. (Seal)
FLORENCE HILL DOUGLASS. (Seal)
HUBERT W. HILL. (Seal)
MILDRED L. HILL. (Seal)
CHRISTINE V. DeFOREST. (Seal)
MAUD B. McGREGOR. (Seal)
By MARY C. HILL, (Seal)
Their Attorney-in-fact. [48]

We accept the foregoing trust.
Dated Dec. 20th, 1922.

JOHN M. WALSH, Trustee.
THOMAS A. KEARNEY, Trustee.

State of California,
County of Lassen,—ss.

On this 20th day of December, 1922, personally appeared before me Geo. *M.* McDow, a Court Commissioner in and for the said County of Lassen, Mary C. Hill, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal at my office in the County of Lassen, the day and year in this certificate first above written.

[Seal]

GEO. N. McDOW,
Court Commissioner.

State of California,
County of Lassen,—ss.

On this 20th day of December, 1922, personally appeared before me, Geo. N. McDow, a Court Commissioner in and for the said County of Lassen, Mary C. Hill, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact or Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglass, Hubert W. Hill, Mildred L.

Hill, Christine V. DeForest and Maud B. McGregor, and who acknowledged to me that she subscribed the names of Mrs. Sadie Case, Cleve Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglass, Hubert W. Hill, Mildred L. Hill, Christine V. DeForest and Maud B. McGregor thereto as principals, and her own name as attorney in fact, and who acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the County of Lassen, the day and year in this certificate first above written.

[Seal]

GEO. N. McDOW,
Court Commissioner.

[Endorsed]: Filed Mar. 19, 1929. Walter B. Maling, Clerk. By F. M. Lampert, Deputy Clerk [49]

[Title of Court and Cause.]

PLAINTIFFS' ANSWER TO CROSS-COMPLAINT CONTAINED IN DEFENDANTS' AMENDED ANSWER TO AMENDED BILL OF COMPLAINT.

For answer to defendants' cross-complaint herein, plaintiffs admit, deny and allege as follows:

1.

Admit the allegations contained in Paragraphs I, II, III, IV, V and VI of said cross-complaint.

2.

Admit that on December 15th, 1917, Thomas Hill signed and acknowledged a deed which on its face purported to convey to his wife, Mary C. Hill, the property described in Paragraph VI of said cross-complaint. Admit that said Thomas Hill, on or about said 15th day of December, 1917, delivered said instrument to Grover C. Julian with instructions to hold the same until the death of said Thomas Hill, and then hand the same to said Mary C. Hill, but deny that said deed was then, or at any other time prior to the death of said Thomas Hill, duly delivered to said Mary C. Hill in the manner alleged or otherwise, with the intent or purpose that [50] the title to said property should vest in said Mary C. Hill subject to a life estate in said Thomas Hill. And in this connection plaintiffs allege that it was the belief of said Thomas Hill that said deed would not, and his intent that it should not, operate to convey any title to said Mary C. Hill until it should thereafter be by said Grover C. Julian handed to her, pursuant to the instructions then given by him to said Julian; and that it was the intent and purpose of said Thomas Hill in so making said deed and delivering the same to said Grover C. Julian to render it unnecessary, in the event of his—Thomas Hill's—death prior to the death of said Mary C. Hill, to include said property as a

part of his estate in probate proceedings. That after the making of said deed and its delivery to Grover C. Julian, as aforesaid, said Thomas Hill remained in possession of said property and operated and controlled the same, and claimed to be the owner thereof and vested with the title in fee thereof.

3.

Admit that the defendants, W. M. Kearney and Patrick Walsh loaned to said Mary C. Hill the sum of $50,000.00, evidenced by two promissory notes and secured by a certain deed of trust, as alleged in Paragraphs VIII, IX and X of said cross-complaint; but in this connection plaintiffs allege that said promissory notes and said trust deed were executed by the children of said Mary C. Hill at the request and direction of the defendant W. M. Kearney. That said children of Mary C. Hill, who signed said notes and said trust deed, are also the children of and heirs at law of said Thomas Hill. Plaintiffs further allege that the defendants, W. M. Kearney and Patrick Walsh had full knowledge and information as to the fact of the death of Thomas Hill, and that said deed from Thomas Hill to Mary C. Hill was not delivered to her until after the [51] death of Thomas Hill, and that said children and heirs at law of said Thomas Hill were requested and required by said W. M. Kearney to sign said promissory notes and trust deed, for the reason that he, the said W. M. Kearney, was fully informed and then knew that said children were each of them heirs at law of said Thomas Hill, and

they and each of them then had a vested interest in said real property.

That the said Mary C. Hill delayed the commencement of proceedings to probate the estate of Thomas Hill until about the month of May, 1923, and, in failing to probate said estate prior to the execution of said promissory notes and trust deed, acted upon the advice of the said W. M. Kearney, who is an attorney at law and who advised her in all matters pertaining to the execution of said promissory notes and trust deed, and that she relied upon his advice and did not at that time, nor until after the completion of said loan, seek other legal advice with reference to the necessity of commencing proceedings to probate the Estate of Thomas Hill, Deceased.

4.

Admit the allegations of Paragraph XI of said cross-complaint.

5.

Answering Paragraph XII of said cross-complaint, deny that said W. M. Kearney and Patrick Walsh so loaned and advanced the said money for the express purpose of paying and discharging said liens, except that, at the direction of said Mary C. Hill, such portion only of said money as was necessary to be paid to secure the discharge of the liens mentioned in Paragraph XI was to be, or was, applied for that purpose.

That from said $50,000.00 the principal and interest owing [52] to Farmers and Merchants National Bank, secured by said trust deed, was paid.

That there was paid to Mrs. Georgiana F. Lonkey one year's interest on said sum of $27,200.00 at 6% per annum, viz., $1,632.00 and no more; that there was deposited in Bank of Lassen County to the credit of Mary C. Hill the sum of $10,000.00, to be used in so far as might be necessary, in the purchase of cattle, which cattle should become security to Mrs. Georgiana F. Lonkey as additional security for the payment of said indebtedness of $27,200. That the sum of $6,302.64, and no more, was so used in the purchase of cattle.

That the said payment of one year's interest and the purchase of cattle, as aforesaid, was all the consideration moving to said Georgiana F. Lonkey from any party to this action, for the release of her said lien upon said real property.

That upon the payment of said indebtedness to Farmers and Merchants National Bank, and said interest to said Georgiana F. Lonkey, and the purchase of said cattle, as aforesaid, the said liens upon said real property were released of record and have never been revived. That no assignment or transfer of said liens to defendants or any other person has ever been made by said lien holders, or either of them.

6.

Answering Paragraph XIII of said cross-complaint, plaintiffs state that they are without knowledge as to the belief of defendants relative to the title to said property.

And in this connection plaintiffs allege that said defendants were fully advised as to the facts rela-

tive to said title, and that said facts did not justify the defendants in the belief alleged in said paragraph.

7.

Admit that Mary C. Hill was appointed administratrix of [53] the Estate or Thomas Hill, Deceased, as alleged in Paragraph XIV of said cross-complaint, and in this connection allege that it was legally necessary that an administration of said estate be had for the settlement and payment of inheritance tax, liens against said estate property, and the payment of claims of creditors of said Thomas Hill.

That as required by law said administratrix duly published notice to creditors of said deceased, and that thereafter, and within the time prescribed by law, numerous claims against said estate were filed by creditors and approved and allowed as provided by law.

That the aggregate amount of claims was in excess of $40,000.00. That certain of said claims, which were preferred, or secured by chattel mortgage, have been paid and settled, but there remain unpaid claims so presented and allowed amounting to $16,820.00, besides interest.

That assets of said estate, exclusive of the real property described in defendants' cross-complaint, were and are insufficient to pay said claims in full, and the costs, charges and expenses of administration.

Admit plaintiffs' claim that Thomas Hill was, at the time of his death, the owner of said land, and

that Mary C. Hill, as administratrix of the Estate of Thomas Hill, Deceased, did, by published notice of sale in said probate proceedings, on or about September 10, 1925, offer for sale all the right, title and interest of said Thomas Hill, deceased, in and to said and other real estate.

Deny that the claims of these plaintiffs and/or any conveyance made by them, or either of them, of said property as the property of said Thomas Hill, or his estate, will create a cloud upon property and/or any lawful title or interest therein of defendants, [54] or either of them.

8.

Answering the further and second defense of defendants' amended answer to plaintiffs' amended bill of complaint herein, which defense is incorporated in defendants' said cross-complaint by reference:

(a) Plaintiffs deny that they, or either of them, or said Thomas Hill, and/or his estate, and/or all or any creditors of his estate, and/or all or any persons claiming by, through, or under the said Thomas Hill, are estopped from denying or disputing the due delivery of said deed from Thomas Hill to Mary C. Hill. Admit the making of said deed by Thomas Hill, and the delivery thereof to Grover C. Julian, with directions to hold the same, and, upon the death of Thomas Hill, to hand the same to said Mary C. Hill; but deny that said Thomas Hill and/or Mary C. Hill thereby placed said instrument in such a position that it would, in the

natural order of events, be recorded and become a public record.

(b) Deny that said defendants relied upon said instrument and/or the record thereof, and deny that they believed that the same had been duly delivered, and deny that they had not notice, knowledge, or information to the contrary; deny that they believed, or *ahd* reason to believe, that said deed was handed to said Grover C. Julian by said Thomas Hill with the intent that the same should thereupon become effective and should invest in Mary C. Hill an estate in remainder in said property after the life estate therein of said Thomas Hill. Deny that said defendants, so relying upon said instrument and the record thereof, or so believing that the same had been duly delivered, loaned and advanced to said Mary C. Hill, on the faith of said instrument, the sum of $50,000.00; deny that at the time of advancing said money said defendants had no knowledge, notice or information in any way disparaging the apparent [55] title of Mary C. Hill to said land; or that they advanced the said money in good faith in reliance upon said title.

On the contrary, plaintiffs allege that defendants, when they made said loan, had full knowledge and information as to the apparent title and interest of Mary C. Hill and her children in said lands, as heirs at law of said Thomas Hill, and that they advanced said money in reliance upon the title and interest in said property of all of said heirs at law and not upon the title and claim of Mary C. Hill alone.

(c) Plaintiffs are without knowledge as to the matters alleged in Paragraph III of said "Further and Second Defense."

(d) Deny that by the reason of the premises defendants were misled to their prejudice by the act of said Thomas Hill. Deny that said Thomas Hill, and/or his estate, and/or all or any persons claiming thereunder, are barred and/or estopped from asserting that said instrument was not so delivered with the intent that the same should become effective.

9.

Answering the further and third defense of defendants' answer herein, which defense is incorporated in defendants' said cross-complaint by reference:

(a) Deney that Bank of Lassen County is barred and/or estopped from denying or disputing the due delivery of said deed from Thomas Hill to Mary C. Hill. Deny that at the time of the promissory notes and deed of trust to defendants said Bank of Lassen County knew that said defendants were about to laon and advance to said Mary C. Hill the sum of $50,000.00, or any other sum whatever, to be secured by said promissory notes and said deed of trust, or knew that said defendants were relying upon the title of Mary C. Hill in and to said land, or were relying upon said deed [56] from Thomas Hill to Mary C. Hill as conveying the title of said land to said Mary C. Hill.

(b) Admit that at said time said Bank of Lassen County had in its possession the statements in

writing made by Thomas Hill, referred to in paragraph II of said further and third defense, but deny that said Bank of Lassen County knew that defendants would not loan the said money if they had known of *ny* fact which threw any doubt upon the validity of said deed.

(c) Deny that said Bank of Lassen County concealed from the defendants the existence of said statements in writing made by Thomas Hill, or that it concealed from said defendants any fact within its knowledge throwing any doubt upon the validity of said deed.

(d) Deny that said Bank of Lassen County had full and complete knowledge of the said transaction between defendants and said Mary C. Hill or her children at the time the same was being negotiated and before and at the consummation thereof; deny that Bank of Lassen County aided in the negotiations for the consummation thereof; deny that said Bank of Lassen County was instrumental in making arrangements with said Georgiana F. Lonkey, whereby certain of the money to be advanced by the defendants to Mary C. Hill would be applied to the satisfaction of said indebtedness, and the mortgage lien of said Georgiana F. Lonkey upon said land would be leased. Admit that there was deposited with said Bank of Lassen County to the credit of Mary C. Hill the sum of $10,000.00 to be used as might be required for the purchase of cattle, which cattle were to be further security to said Georgiana F. Lonkey for indebtedness of Thomas Hill to her, as hereinbefore alleged; deny

that said Bank of Lassen County recommended to defendants the making of said loan to Mary C. Hill, and/or urged the same. [57]

(e) Deny that by reason of the representations made to the defendants by Bank of Lassen County, and/or by reason of its failure to inform the defendants of the facts within its knowledge, said Bank is barred and/or estopped from relying upon any of said facts in order to show that it was not the intent of said Thomas Hill to deliver said deed, or as showing that said Thomas Hill did not intend that said deed should be effective; deny that it would be against equity and good conscience to permit said Bank of Lassen County to use any of said facts, or by reason thereof to deny that Mary C. Hill is and was the owner of said property at the time said defendants loaned said money to her and took said promissory notes and trust deed from her.

(f) Deny that by reason of the premises alleged in said further and third defense, or by or for any other reason said Bank of Lassen County is barred and/or estopped from claiming any part of the proceeds of said land, in order to satisfy its claim against said Thomas Hill, until the defendants herein have been fully paid for their advance to said Mary C. Hill.

10.

Further answering said cross-complaint: Deny that no part of the principal or interest due on said promissory notes has ever been paid, as alleged in Paragraph XVII, and on the contrary alleges

that the interest on said notes was fully paid to February 1, 1924.

11.

Deny that said John M. Walsh and Thomas A. Kearney, as trustees under said deed of trust, sold all of said property in accordance with the provisions of said deed of trust, and in this connection plaintiffs allege:

That subsequent to the filing of plaintiff's original [58] bill of complaint herein, to wit, on or about June 14, 1926, the defendant, Thomas A. Kearney, claiming to act as trustee under authority of said deed of trust, attempted and pretended to sell the lands and premises covered by said deed of trust. That at said attempted and pretended sale John M. Walsh, who was then alive, and who was cotrustee with Thomas A. Kearney under said deed of trust, was not present at and did not participate in said pretended sale. Deny that pursuant to said sale and the deed executed by said trustees the said corporation, Patrick Walsh & Sons, Incorporated, ever since has been, and now is, the owner of said land and premises; deny that all adverse claims of plaintiffs thereto are without right. And in this connection plaintiffs allege, upon information and belief, that said John M. Walsh, who is named in said deed of trust as one of the trustees thereunder, was the son of said Patrick Walsh, and was one of the incorporators and/or stockholders of Patrick Walsh & Sons, Incorporated, and that said pretended sale was, by reason of the matters now alleged, null and void.

12.

Deny that the defendants and cross-complainants have no plain, speedy or adequate remedy in the ordinary course of law.

13.

Plaintiffs further allege the claim and cause of action of the defendants for their subrogation to the rights and liens of Farmers and Merchants National Bank and of Georgiana F. Lonkey is barred by the provisions of Section 337 of the Code of Civil Procedure of the State of California.

14.

For further answer and defense to said cross-complaint, plaintiffs allege that if said Thomas Hill, in making and delivering to Grover C. Julian said deed to his wife, Mary C. Hill, intended [59] that the same should operate to vest in Mary C. Hill, the title in fee of said lands, subject only to a life estate in him, the said Thomas Hill, as claimed and alleged by the defendants herein, then, and in that case, said deed was fraudulent and void as against all persons who were then creditors of said Thomas Hill, and all persons who might thereafter, and prior to the delivery of said deed to Mary C. Hill and the recordation thereof, become creditors of said Thomas Hill, without notice or knowledge of said deed. And in this connection allege that neither Bank of Lassen County or any other of the creditors of Thomas Hill, whose claims remain unpaid, had any notice or knowledge of said deed

prior to its recordation subsequent to the death of said Thomas Hill.

WHEREFORE, plaintiffs pray that defendants take nothing by their said cross-complaint and said cross-complaint be dismissed.

J. E. PARDEE,
Solicitor for Plaintiffs. [60]

State of California,
County of Lassen,—ss.

J. E. Pardee, being first duly sworn, says: That he is solicitor for the plaintiffs named in the foregoing answer to defendants' cross-complaint; that he resides and has his office in Susanville, California; that on the eighth day of April, 1929, he served a true copy of said answer upon Edward F. Treadwell, one of the solicitors for said defendants, by depositing said copy in the postoffice at Susanville, properly addressed to said Edward F. Treadwell at his office in the Standard Oil Building, San Francisco, California, with the postage thereon fully prepaid.

J. E. PARDEE.

Subscribed and sworn to before me, this 8th day of April, 1929.

[Seal] J. A. PARDEE.
Notary Public.

[Endorsed]: Filed Apr. 9, 1929. [61]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 6th day of May, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause—Cause Nos. 198, 208.]

MINUTES OF COURT—MAY 6, 1929—TRIAL.

These cases came on this day for trial before Judge Kerrigan; W. G. Treadwell, Esq., appearing as attorney for plaintiff and defendant, Walsh et al., and J. E. Pardee and R. M. Rankin, appearing as attorneys for plaintiff, Bank of Lassen, and defendant, Hill. After hearing Mr. Treadwell and no objection being made thereto, it was ordered that the two cases be consolidated for trial. Mr. Treadwell, on behalf of the plaintiff and defendant Walsh introduced in evidence and filed the depositions of Seymour Case, Grover C. Julian and Miss Alcesta Lowe, and W. M. Kearney was sworn and testified on behalf of the plaintiffs, and plaintiffs rested. Attorneys for the respective parties, plaintiffs and defendant, Bank of Lassen called C. A. Bridges and J. E. Pardee, who were sworn and testified, and plaintiffs and defendant introduced in evidence and filed their exhibits marked:

Defendants' Exhibit "B"—Note.
Defendants' Exhibit "C"—Mortgage.
Defendants' Exhibit "D"—Deposit Slip*p*.
Defendants' Exhibit "E"—Bill of Sale.
Defendants' Exhibit "F"—Deed.
Defendants' Exhibit "G"—Reconveyance.
Defendants' Exhibit "H"—Release.
Defendants' Exhibit "I"—Affidavit of Publication.
Defendants' Exhibit "J"—Articles of Incorporation. [62]

and introduced in evidence and filed the deposition of Mary C. Hill, and rested. After hearing attorneys it was ordered that the case stand submitted, on briefs filed and to be filed in 15 and 5 days. [63]

[Title of Court and Cause—Cause Nos. 198—Eq., 202—Eq.]

Before KERRIGAN, District Judge.

November 22, 1929.

MEMORANDUM OPINION.

On examination of the records in these two cases, I reach the following conclusions:

1. There was no delivery of the deed to the property involved herein from Thomas Hill to his wife, Mary C. Hill, during the lifetime of the grantor.

2. Patrick Walsh & Sons, Incorporated, W. M. Kearney and Patrick Walsh failed to obtain a valid first lien on the fee-simple title to the property involved herein.

3. There is no estoppel against the estate of Thomas Hill which will preclude Mary C. Hill, as administratrix, from denying the delivery of the above-mentioned deed, either by way of defense in No. 198, or as plaintiff in No. 208. [64]

4. There is no estoppel against the Bank of Lassen County which will preclude it from denying the delivery of the same deed.

5. Mary C. Hill, individually, and the other heirs of Thomas Hill joining in the trust deed are estopped to deny the validity of the lien thus created, and any right or title in or to the property, or moneys acquired from a probate sale thereof, to which they may be entitled as heirs at law of Thomas Hill, is subject to said deed of trust.

6. Patrick Walsh & Sons, Incorporated, W. M. Kearney and Patrick Walsh are not entitled to be subrogated to the prior liens upon the property discharged with funds loaned on security of the invalid trust deed. The right to subrogate involves the application of a rule of property, as to which this court will conform to the decisions of the courts of the State of California where the land is situated. Under the rule of Brown vs. Rouse, 125 Cal. 645, and Guy vs. Du Uprey, 16 Cal. 196, there is no right of subrogation here. See also, note, 43 A. L. R. 1393, 1400.

Let decrees be prepared in the respective cases in accordance with these conclusions. The several parties to bear their own costs.

FRANK H. KERRIGAN,
U. S. District Judge.

[Endorsed]: Filed Nov. 22, 1929. [65]

In the Northern Division of the United States District Court for the Northern District of California.

EQUITY—No. 208.

BANK OF LASSEN COUNTY, a Corporation, and MARY C. HILL, as Administratrix of the Estate of THOMAS HILL, Deceased,

Plaintiffs,

vs.

JOHN M. WALSH and THOMAS A. KEARNEY, Trustees, and W. M. KEARNEY and PATRICK WALSH,

Defendants.

DECREE.

This cause came on to be heard on the 6th day of May, 1929; evidence was introduced and the cause was argued by counsel, and on November 22, 1929, the Court ordered that a decree be signed, filed and entered herein in accordance with the memorandum opinion of the Court on file.

Now, therefore, it is hereby ORDERED, ADJUDGED AND DECREED, in accordance with said memorandum opinion, as follows, to wit:

(1) That the certain deed set forth on the pleadings, which was executed by Thomas Hill, as grantor, to Mary C. Hill, his wife, as grantee, and dated December 15, 1917, was not delivered to said grantee during the lifetime of said grantor and did not operate to convey to said grantee any title to the land therein described.

(2) That thereafter the said Thomas Hill died intestate and the title to said lands vested in his heirs at law, subject, however, to administration and to the power of the Court in probate to subject said property to the payment of the decedent's debts, the family allowance, and expenses of administration; and that therefore the defendants are not entitled to quiet their title [66] to said lands as against the plaintiff Mary C. Hill, as administratrix of the Estate of Thomas Hill, Deceased.

(3) That Patrick Walsh & Sons, Incorporated, W. M. Kearney and Patrick Walsh failed to obtain a valid first lien on the property involved herein by, through, or under the deed of trust set out in defendants' amended answer and cross-complaint herein.

(4) That there is no estoppel against the Estate of Thomas Hill, Deceased, which precludes Mary C. Hill, as administratrix of said estate from denying the delivery of the deed above-mentioned from Thomas Hill to his wife, Mary C. Hill.

(5) That there is no estoppel against the plaintiff, Bank of Lassen County, which will preclude it from denying the delivery of the same deed.

(6) That Mary C. Hill, individually, and the other heirs at law of Thomas Hill, deceased, who joined in the execution of said deed of trust, are estopped to deny the lien created by said deed of trust; and that any right or title in or to the property, or money acquired, or to be acquired, from a probate sale of said property, to which they may be entitled as heirs at law of said Thomas Hill, deceased, or otherwise, is subject to said deed of trust, and must be paid (or distributed) to the defendants in this action.

(7) That Patrick Walsh & Sons, Incorporated, W. M. Kearney and Patrick Walsh are not entitled to be subrogated to the prior liens upon the property involved herein, which prior liens were discharged with the funds loaned on the security of the aforesaid deed of trust.

(8) That the several parties hereto shall each bear their own costs.

(9) The lands hereinbefore referred to and affected hereby are situate in the County of Lassen, State of California, [67] and described as follows, to wit:

The W. ½ of NW. ¼, SE. ¼ of NW. ¼ and the SW. ¼ of Section 2; the E. ½, SW. ¼, S. ½ of NW. ¼ and the NW. ¼ of NW. ¼ of Section 3; the E. ½, S. ½ of SW. ¼ and the NE. ¼ of SW. ¼ of Section 4; the E. ½ of NE. ¼ and the SE. ¼ of Section 8; the N. ½ N. ½ of SE. ¼ and the W. ½

of SW. ¼ of Section 9; the N. ½ of N. ½ and the SW. ¼ of NW. ¼ of Section 10; the W. ½, W. ½ of E. ½, and the E. ½ of SE. ¼ of Section 11; the NE. ¼ of NW. ¼ and the W. ½ of NE. ¼ of Section 14; also a piece of land bounded as follows: Beginning at a point 10 chains west of the corner of Sections 11–12–13 and 14, and running thence South 15 chains; thence South 58° 45′ West, 11.72 chains to the quarter-quarter line; thence north along said quarter-quarter line 21.10 chains to the line between Sections 11 and 14; thence east 10 chains to the place of beginning, being in said Section 14, all in Township 31 North, Range 12 East, M. D. M.

Also the SE. ¼ of SE. ¼ of Section 34, and the W. ½ of SW. ¼ of Section 35, in Township 32 North, Range 12 East, M. D. M.

Also the N. ½ of SW. ¼ of Section 2, and the E. ½ of SE. ¼ of Section 3, in Township 31 North, Range 11 East, M. D. M., containing in all 3,218.58 acres, more or less, according to Government survey.

Given this 13th day of December, 1929.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed and entered Dec. 14, 1929. [68]

[Title of Court and Cause.]

PETITION FOR ORDER ALLOWING APPEAL.

To the Honorable the Judges of the United States District Court for the Northern District of California:

The defendants above named, feeling themselves aggrieved by the judgment of the Honorable Court made and entered in this cause on the 12th day of December, 1929, do, through their undersigned attorneys, respectfully petition and pray for the allowance of an appeal from said judgment to the United States Circuit Court of Appeals of the Ninth Circuit under and according to the laws of the United States in such cases made and provided, and that an order be made fixing the amount of security to be given by the defendants and appellants, conditioned as the law directs; and that upon the giving of such bond as may be required, all further proceedings be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals.

W. M. KEARNEY,
N. J. BARRY,
EDWARD F. TREADWELL,
Solicitors for Defendants and Appellants.

[Endorsed]: Filed Jan. 20, 1930. [69]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now come the defendants above named and in connection with their petition for an order allowing an appeal in said cause, assign the following errors which they aver occurred on the trial thereof and upon which they rely to reverse the judgment entered herein as appears of record:

1. The Court erred in holding that there was no delivery of the deed to the property involved herein from Thomas Hill to his wife, Mary C. Hill, during the lifetime of the grantor.

2. The Court erred in holding that Patrick Walsh & Sons, Inc., W. M. Kearney and Patrick Walsh failed to obtain a valid first lien on the fee-simple title to the property involved herein.

3. The Court erred in holding that there is no estoppel against the estate of Thomas Hill which will preclude Mary C. Hill, as administratrix, from denying the delivery of the above-mentioned deed. [70]

4. The Court erred in holding that there is no estoppel against the Bank of Lassen County which will preclude it from denying the delivery of the said deed.

5. The Court erred in holding that Patrick Walsh & Sons, Inc., W. M. Kearney and Patrick Walsh are not entitled to be subrogated to the prior liens upon the property discharged with funds

loaned on security of the deed of trust made by said Mary C. Hill to defendants.

WHEREFORE, said defendants and appellants pray that the said decree be reversed.

W. M. KEARNEY,
N. J. BARRY,
EDWARD F. TREADWELL,
Solicitors for Defendants and Appellants.

[Endorsed]: Filed Jan. 20, 1930. [71]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The defendants above named having heretofore filed their petition for an order allowing an appeal from the judgment of this Court heretofore entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which defendants and appellants should give and furnish upon said appeal, and that upon the giving of said security all further proceedings be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals,—

NOW, THEREFORE, IT IS ORDERED that the prayer of said petition be allowed, and that an appeal be and the same is hereby allowed.

IT IS FURTHER ORDERED that, upon the filing with the Clerk of this Court by defendants and appellants of a good and sufficient bond in the

sum of $1,000, said bond to be approved by the Court, all further proceedings be and they are hereby suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals.

Dated this 20th day of January, 1930.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Jan. 20, 1930. [72]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that John M. Walsh and Thomas A. Kearney, Trustees, W. M. Kearney, and W. S. Brown as Executor of the Last Will and Testament of Patrick Walsh, Deceased (substituted as defendant in the place and stead of Patrick Walsh), as principals, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact business in the State of California, as surety, are held and firmly bound unto Bank of Lassen County, a corporation, and Mary C. Hill, as Administratrix of the Estate of Thomas Hill, Deceased, in the full and just sum of $1,000, to be paid to said defendants, their certain attorneys, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, ex-

ecutors and administrators, jointly and severally, by these presents.

WHEREAS, lately in the Northern Division of the District Court of the United States for the Northern District of California [73] in a suit depending in said court between the above-named plaintiffs and defendants a judgment was rendered in favor of said plaintiffs and against said defendants, and

WHEREAS, said defendants having obtained from the above-entitled court an order allowing an appeal to reverse the judgment in said cause, and a citation directed to said plaintiffs citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City and County of San Francisco, State of California,—

NOW, THEREFORE, the condition of the above obligation is such, that if the said defendants and appellants shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and effect.

IT IS FURTHER STIPULATED as a part of the foregoing bond, that in case of the breach of any condition thereof, the above-named District Court may, upon notice to the surety above named, proceed summarily in said action or suit to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor.

IN WITNESS WHEREOF, we have hereunto

set our hands and seals and caused these presents to be executed this 27th day of December, 1929.

W. M. KEARNEY.

AMERICAN SURETY COMPANY OF NEW YORK.

By K. F. WARRACK,
Resident Vice-President.

Attest: E. C. MILLER,
Resident Assistant Secretary.

The foregoing bond is hereby approved this 20th day of Jan., 1930.

FRANK H. KERRIGAN,
District Judge. [74]

State of California,
City and County of San Francisco.

On this 27th day of December, in the year one thousand nine hundred and twenty-nine, before me, John McCallan, a notary public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared K. F. Warrack and E. C. Miller, known to me to be the resident vice-president and resident assistant secretary respectively of the American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in

the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires 4/12/33.

[Endorsed]: Filed Jan. 20, 1930. [75]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in the above-entitled cause to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, incorporating therein the following portions of the record, to wit:

1. Amended bill of complaint.
2. Amended answer to amended bill of complaint.
3. Answer to cross-complaint contained in defendants' amended answer to amended bill of complaint.
4. Order of consolidation.
5. Condensed statement of testimony and evidence.
6. Memorandum opinion.
7. Decree.
8. Petition for order allowing appeal.
9. Assignment of errors.
10. Order allowing appeal. [76]

11. Bond on appeal with order approving same.
12. Citation on appeal with proof of service.
13. Praecipe for transcript of record.

W. M. KEARNEY,
N. J. BARRY,
EDWARD F. TREADWELL,
Solicitors for Defendants and Appellants.

Due service and receipt of copy of within acknowledged this 24th day of January, 1930.

J. E. PARDEE and
R. M. RANKIN.

[Endorsed]: Filed Jan. 29, 1930. [77]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 162 pages numbered from 1 to 162, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Bank of Lassen County, etc., et al. vs. John M. Walsh et al., Equity No. 208, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the

sum of Seventy-three and 40/100 (73.40) Dollars, and that the same has been paid to me by the attorneys for appellants herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court this 15th day of February, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [78]

[Title of Court and Cause.]

CITATION.

The President of the United States to Bank of Lassen County, a Corporation, and Mary C. Hill, as Administratrix of the Estate of Thomas Hill, Deceased, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City and County of San Francisco, State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal duly made and now on file in the office of the Clerk of the above-entitled court wherein defendants above named are appellants and you are appellees, to show cause, if any there be, why the judgment rendered against said appellants, as in the said order allowing

the appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRANK H. KERRIGAN, Judge of the United [79] States District Court for the Northern District of California, this 20th day of January, 1930.

FRANK H. KERRIGAN,
District Judge.

Receipt of a copy of the foregoing citation, together with a copy of order allowing appeal and a copy of assignment of errors, is acknowledged this —— day of ————, 1930.

————————————,
————————————,
Solicitors for Plaintiffs and Respondents.

[Endorsed]: Filed Jan. 20, 1930. [80]

[Title of Court and Cause.]

ADMISSION OF SERVICE OF CITATION.

Due service of citation on appeal in the above-entitled suit is hereby admitted this 24th day of January, 1930.

J. E. PARDEE,
R. M. RANKIN,
Solicitors for Plaintiffs.

[Endorsed]: Filed Jan. 29, 1930. [81]

[Endorsed]: No. 6074. United States Circuit Court of Appeals for the Ninth Circuit. John M. Walsh and Thomas A. Kearney, Trustees, W. M. Kearney and W. S. Brown, as Executor of the Last Will and Testament of Patrick Walsh, Deceased (Substituted as Defendant in the Place and Stead of Patrick Walsh), Appellants, vs. Bank of Lassen County, a Corporation, and Mary C. Hill, as Administratrix of the Estate of Thomas Hill, Deceased, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed February 17, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6074.

BANK OF LASSEN COUNTY, a Corporation, et al.,

Respondents,

vs.

JOHN M. WALSH et al.,

Appellants.

PRAECIPE REGARDING PRINTING OF RECORD.

The appellants in the above-entitled action hereby request the printing of the entire record in the above-entitled matter with the exception of the condensed statement of the testimony and evidence, and that in lieu thereof the "Stipulation Regarding Printing of Record" on file herein be printed.

WM. M. KEARNEY,
N. J. BARRY,
EDWARD F. TREADWELL,
Attorneys for Appellants.

[Endorsed]: Praecipe Regarding Printing of Record. Filed Feb. 18, 1930. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6074.

BANK OF LASSEN COUNTY, a Corporation, et al.,

Respondents,

vs.

JOHN M. WALSH et al.,

Appellants.

STIPULATION REGARDING PRINTING OF RECORD.

IT IS HEREBY STIPULATED that in printing the record in the above-entitled cause the condensed statement of the testimony and evidence may be omitted, it being identical with the condensed statement of the testimony and evidence in the case of Patrick Walsh & Sons, Inc., et al., Appellants, vs. Mary C. Hill et al., Respondents, and the same may be referred to by the Court and the parties herein with the same effect as if printed in full in the record on appeal herein.

Dated, San Francisco, California, this 27th day of January, 1930.

W. M. KEARNEY,
N. J. BARRY,
EDWARD F. TREADWELL,
Attorneys for Appellants.
J. E. PARDEE,
R. M. RANKIN,
Attorneys for Respondents.

The foregoing stipulation is hereby approved.
By the Court.

FRANK H. RUDKIN,
Presiding Judge.

[Endorsed]: Stipulation Regarding Printing of Record. Filed Feb. 18, 1930. Paul P. O'Brien, Clerk.

No. 6075

United States

Circuit Court of Appeals

For the Ninth Circuit.

PATRICK WALSH & SONS, INC., a Corporation (Substituted as Complainant in the Place and Stead of JOHN M. WALSH and THOMAS A. KEARNEY, as Trustees), W. M. KEARNEY, and W. S. BROWN, as Executor of the Last Will and Testament of PATRICK WALSH, Deceased (Substituted as Complainant in the Place and Stead of PATRICK WALSH),

Appellants,

vs.

MARY C. HILL et al.,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6075

United States

Circuit Court of Appeals

For the Ninth Circuit.

PATRICK WALSH & SONS, INC., a Corporation (Substituted as Complainant in the Place and Stead of JOHN M. WALSH and THOMAS A. KEARNEY, as Trustees), W. M. KEARNEY, and W. S. BROWN, as Executor of the Last Will and Testament of PATRICK WALSH, Deceased (Substituted as Complainant in the Place and Stead of PATRICK WALSH),

Appellants,

vs.

MARY C. HILL et al.,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Attorneys for Appellants:

W. M. KEARNEY, Esq., Reno, Nev.

N. J. BARRY, Esq.

EDWARD F. TREADWELL, Esq., San Francisco, Calif.

Attorneys for Appellees:

J. E. PARDEE, Esq., Susanville, Calif.

R. M. RANKIN, Esq., Willows, Calif.

In the Northern Division of the United States District Court, for the Northern Division of California.

IN EQUITY—No. 198.

PATRICK WALSH & SONS INCORPORATED, a Corporation (Substituted as Complainants in the Place and Stead of JOHN M. WALSH and THOMAS A. KEARNEY, as Trustees), and W. M. KEARNEY and PATRICK WALSH,

Complainants,

vs.

MARY C. HILL, MRS. SADIE CASE, CLEVE HILL, JOSEPH HILL, ROBERT ELMER HILL, THOMAS GAY HILL, LAWRENCE HILL, JESSIE I. HILL, JIMMIE O. HILL,

FLORENCE HILL DOUGLAS, HUBERT W. HILL, MILDRED L. HILL, CHRISTINE V. DeFOREST, MAUDE B. McGREGOR, MARY C. HILL, as Administratrix of the Estate of THOMAS HILL, Deceased, JOHN DOE, RICHARD ROE, SALLY MOE FIRST and SALLY MOE SECOND,

Defendants.

AMENDED COMPLAINT.

Now come the complainants, Patrick Walsh & Sons Incorporated, a corporation (substituted as complainants in the place and stead of John M. Walsh and Thomas A. Kearney, as trustees), and W. M. Kearney and Patrick Walsh, and by leave of the court first had and obtained file this their amended bill of complaint, and complain of the defendants above named, and for cause of suit allege:

I.

That the complainants and each of them are and were at all times herein mentioned citizens, residents and inhabitants of the State and District of Nevada.

II.

That the defendants are and each of them is and was at all [1*] times herein mentioned citizens, residents and inhabitants of the State of California.

III.

That the matter in controversy in this suit, ex-

*Page-number appearing at the foot of page of original certified Transcript of Record.

clusive of interest and costs, exceeds the sum of $3,000.

IV.

That on May 25, 1923, Mary C. Hill was, by an order and decree of the Superior Court of the State of California, in and for the County of Lassen, duly appointed administratrix of the estate of Thomas Hill, deceased, and thereafter duly qualified as such, and is now and at all times after said date has been the duly qualified and acting administratrix of the estate of Thomas Hill, deceased.

V.

That the said Patrick Walsh & Sons Incorporated, a corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada and is a citizen and resident of the State of Nevada.

VI.

That prior to any of the times herein mentioned the said Thomas Hill and the said Mary C. Hill were husband and wife, and the said Thomas Hill was the owner in fee, in the possession and entitled to the possession of those certain lots, pieces and parcels of land situate, lying and being in the County of Lassen, State of California, and more particularly bounded and described as follows, to wit:

> The W.½ of NW.¼, SE.¼ of NW.¼ and the SW.¼ of Section 2; the E.½, SW.¼, S.½ of NW.¼ and the NW.¼ of NW.¼ of Section 3; the E.½, S.½ of SW.¼ and the NE.¼ of

SW.¼ of Section 4; the E.½ of NE.¼ and the SE.¼ of Section 8; the N.½ of N.½ of SE.½ and W.½ of SW.¼ of Section 9; the N.½ of N.½ and SW.¼ of NW.¼ of Section 10; the W.½, W.½ of E.½ and the E.½ of SE.¼ of Section 11; the NE.¼ of NW.¼ and the W.½ of NE.¼ of Section 14; [2] also a piece of land bounded as follows: Beginning at a point 10 chains west of the corner of Sections 11, 12, 13 and 14 and running thence South 15 chains; thence South 58° 45′ West, 11.72 chains to the quarter-quarter line; thence north along said quarter-quarter line 21.10 chains to the line between Sections 11 and 14; thence east 10 chains to the place of beginning, being in said Section 14, all in Township 31 North, Range 12 East, M. D. M.;

Also the SE.¼ of SE.¼ of Section 34, and the W.½ of SW.¼ of Section 35, in Township 32 North, Range 12 East, M. D. M.;

Also the N.½ of SW.¼ of Section 2, and the E.½ of SE.¼ of Section 3, in Township 31 North, Range 11 East, M. D. M., containing in all 3, 218.58 acres, more or less according to Government Survey.

VII.

That on the 15th day of December, 1917, the said Thomas Hill signed and executed a deed conveying all of the said property to his said wife, Mary C. Hill, and thereupon on the said 15th day of December, 1917, duly acknowledged the same before a

notary public in and for the said county and state, duly authorized to take such acknowledgments, and thereupon delivered the said instrument in the presence of the said Mary C. Hill to one Grover C. Julien with instructions to hold the same until the death of the said Thomas Hill, and then hand the same to the said Mary C. Hill; and said complainants are informed and believe and on such information and belief allege that the said deed was on the said 15th day of December, 1917, duly delivered by the said Thomas Hill to the said Mary C. Hill in the manner aforesaid and with the intent and purpose that title to the said property should vest in the said Mary C. Hill, subject to a life estate in the said Thomas Hill. A copy of the said deed is hereunto annexed, marked Exhibit "A" and made a part hereof.

VIII.

Thereafter the said Thomas Hill died, and thereupon and [3] on or about the 8th day of August, 1922, the said Grover C. Julien handed the said deed to the said Mary C. Hill and she recorded the same on the 8th day of August, 1922, at thirty minutes past two o'clock P. M. in the office of the County Recorder of the said county and state, and the same was thereupon recorded in Book 9 of Deeds, at page 266. Thereafter and on or about the 20th day of December, 1922, the plaintiffs, W. M. Kearney and Patrick Walsh loaned and advanced to the said Mary C. Hill the sum of $50,000 evidenced by two certain promissory notes executed by said Mary C.

Hill and her children, Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglas, Hubert W. Hill, Mildred L. Hill, Christine V. DeForest and Maud B. McGregor, in words and figures following, to wit:

$8000.00 Reno, Nevada,
December 20th, 1922.

One year after date, without grace, for value received, we, or either of us, promise to pay to W. M. Kearney, or order, at Reno, Nevada, the sum of Eight Thousand Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of eight per cent per annum from date until paid. Interest payable semi-annually, also after judgment.

The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker or makers thereof, or either of them. In the event of the non-payment of this said note at maturity, or at its collection by suit, we, or either of us, agree to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end bind ourselves, our heirs, executors, administrators and assigns forever. For the purpose of attachment or levy of execution, this note shall

be payable wherever we, or either of us, may be situated, at the option of the holder.

MARY C. HILL.
MRS. SADIE CASE.
CLEVE HILL.
JOSEPH HILL.
ROBERT ELMER HILL.
THOMAS GAY HILL.
LAWRENCE HILL.
JESSIE I. HILL.
JIMMIE O. HILL.
FLORENCE HILL DOUGLAS.
HUBERT W. HILL.
MILDRED L. HILL.
CHRISTINE V. DeFOREST.
MAUD B. McGREGOR.
By MARY C. HILL,
Their Attorney-in-fact.

(1.60 Documentary Stamps cancelled.) [4]

$42,000.00 Reno, Nevada.
December 20th, 1922.

Three years after date, without grace, for value received, we, or either of us, promise to pay to Patrick Walsh, or order, at Austin, Nevada, the sum of Forty-two Thousand Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of eight per cent per annum from date until paid. Interest payable semi-annually, also after judgment.

The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for non-payment of this

note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker or makers thereof, or either of them. In the event of the non-payment of this said note at maturity, or its collection by suit, we, or either of us, agree to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end bind ourselves, our heirs, executors, administrators, and assigns forever. For the purpose of attachment by levy or execution, this note shall be payable wherever we, or either of us, may be situated, at the option of the holder.

MARY C. HILL.
MRS. SADIE CASE.
CLEVE HILL.
JOSEPH HILL.
ROBERT ELMER HILL.
THOMAS GAY HILL.
LAWRENCE HILL.
JESSIE I. HILL.
JIMMIE O. HILL.
FLORENCE HILL DOUGLAS.
HUBERT W. HILL.
MILDRED L. HILL.
CHRISTINE V. DeFOREST.
MAUD B. McGREGOR.
By MARY C. HILL,
Their Attorney-in-fact.

($8.40 Documentary Stamps cancelled.)

IX.

That at the time of the delivery of the said notes

and the payment of said sum, and to secure the payment of the said principal sum and the interest thereon, as mentioned in said notes, the said Mary C. Hill and her said children duly executed and delivered to the plaintiffs, John M. Walsh and Thomas A. Kearney, as trustees, their deed of trust bearing date the 20th day of December, 1922, conveying unto them the land and premises above described. A copy [5] of said deed of trust is attached hereto marked Exhibit "B" and made a part hereof.

X.

The said trust deed was duly acknowledged so as to entitle it to be recorded, and on the 3d day of January, 1923, the same was duly recorded in the office of the County Recorder of Lassen County, California, in Book C of Trust Deeds, at page 249 and following.

XI.

That at and prior to the time that the said complainants so advanced and loaned the said sum of money to the said Mary C. Hill the said land above described was subject to certain liens created thereon by the said Thomas Hill and Mary C. Hill, to wit:

(1) On or about the 15th day of December, 1917, the said Thomas Hill and the said Mary C. Hill borrowed the sum of $30,000 from Farmers & Merchants National Bank of Reno, Nevada, and, in order to secure the payment thereof, together with interest on $15,000 thereof at eight per cent per annum, and on $15,000 thereof at seven per cent per

annum, made, executed and delivered to Richard Kirman and Walter J. Harris a deed of trust by which the said property was conveyed to the said Richard Kirman and Walter J. Harris in trust, which said deed of trust was thereafter on the 15th day of December, 1917, duly recorded in the office of the County Recorder of the County of Lassen, State of California, in Book B of Deeds at page 500 and following; and at the time the plaintiffs so loaned and advanced the said money to the said defendants the principal and interest due on the indebtedness referred to in the said deed of trust was unpaid and the said land was subject to a lien therefor.

(2) On or about the 10th day of July, 1921, the said Thomas Hill and the said Mary C. Hill made, executed and delivered to one Georgiana F. Lonkey a mortgage upon the said land to secure the payment of the sum of $27,200 on the 10th day of July, 1923, together [6] with interest at six per cent per annum, which mortgage was duly recorded in the office of the Recorder of the County of Lassen, State of California, on the 23d day of August, 1921, in Book R of Mortgages at page 193 and following. At the time the said plaintiffs so loaned the said money to the said Mary C. Hill the indebtedness secured by the said mortgage and recited therein was unpaid, and the said property was subject to the lien of the said mortgage.

XII.

That the said Mary C. Hill requested the plain-

tiffs herein to advance and loan to her the said sum of money so loaned by the said plaintiffs to her for the express purpose of paying and discharging the said liens upon the said land, and the said plaintiffs so loaned and advanced the said money for the express purpose of paying and discharging the said liens, and the said plaintiffs, themselves, at the direction of the said Mary C. Hill, saw to it that the said money was applied to discharge the said liens and the said indebtedness; and thereupon the said plaintiffs did, under the direction of the said Mary C. Hill, apply the said money so loaned by them to her upon said indebtedness as follows: They paid to the said Richard Kirman and Walter J. Harris on the principal and interest due upon the said indebtedness secured by the said deed of trust to said Richard Kirman and Walter J. Harris the sum of $32,050, and the same was received by the said Richard Kirman and Walter J. Harris in satisfaction of the said indebtedness, and thereupon the said Richard Kirman and Walter J. Harris reconveyed all the right, title, interest and estate in and to the said property which they obtained by the said deed of trust to the said Mary C. Hill. The said plaintiffs paid to the said Georgiana F. Lonkey the sum of $14,800 upon the principal and interest due to the said Georgiana F. Lonkey and evidenced by the said mortgage and secured thereby. In consideration of the said payment to the said Georgiana [7] F. Lonkey the said Georgiana F. Lonkey released the said land from the lien of the said mortgage, and duly recorded in the office of the Recorder of the

County of Lassen, State of California, a release of the said land from said mortgage.

XIII.

At the time that the said plaintiffs so loaned the said money to the said Mary C. Hill they believed that the said Mary C. Hill was the owner in fee of the said property and that the said deed from the said Thomas Hill to Mary C. Hill was duly delivered to her, and believed and intended that by the said deed of trust so executed by the said Mary C. Hill to the complainants they would obtain and did obtain a first and valid lien upon the fee-simple title to the said land, and the said Mary C. Hill likewise believed and represented to the plaintiffs that she was the owner in fee of the said land and that the said plaintiffs would acquire a first lien on the fee-simple title to the said land.

XIV.

Notwithstanding the premises, the said defendant Mary C. Hill thereafter and on or about the 25th day of May, 1923, had herself appointed administratrix of the estate of Thomas Hill, deceased, and thereupon the said Mary C. Hill and the other defendants herein claimed that the said Thomas Hill was the owner of the said land and the said defendants ever since said time have threatened to convey the said land as the property of the said Thomas Hill and his estate; that the claims of the said defendants and any conveyance made by them of the said property as the property of the said Thomas Hill or his estate will create a cloud upon

the said property and the title of plaintiffs thereto. [8]

XV.

That the said Thomas Hill and his estate and the defendants herein are estopped from denying or disputing the due delivery of the said deed from said Thomas Hill to Mary C. Hill, and in this behalf complainants allege that the said instrument was prepared by the direction of the said Thomas Hill, and was signed by him with the knowledge of the said Mary C. Hill, and was acknowledged by him in such a manner as to entitle the same to be recorded, and was with the knowledge and in the presence of the said Mary C. Hill put in the custody of one Grover C. Julien, an attorney at law, with directions to said Grover C. Julien to hold the same and upon the death of the said Thomas Hill to hand the same to said Mary C. Hill to be recorded, and the said Thomas Hill and the said Mary C. Hill thereby placed the said instrument in such a position that the same would in the natural order of events be recorded and become a public record, and the same was so handed to the said Mary C. Hill and placed of record as aforesaid; and the said complainants, relying upon the said instrument and the record thereof, and believing that the same had been duly delivered, and having no knowledge or information to the contrary, advanced said money on the faith of the said instrument; and at the time of so advancing said money the said plaintiffs had no knowledge, notice or information in any way disparaging the apparent title of the said Mary C. Hill to the

said land, and they advanced the said money in good faith in reliance upon such title.

XVI.

The said plaintiffs W. M. Kearney and Patrick Walsh have ever since been the owners and holders of the said promissory notes set forth herein, and no part of the principal or interest due thereon has ever been paid. [9]

XVII.

Since the commencement of this action, the said indebtedness being entirely unpaid, the said John M. Walsh and Thomas A. Kearney, as trustees under the said deed of trust, sold all of the said property in accordance with the provisions of the said deed of trust and at the sale thereof the said Patrick Walsh & Sons Incorporated, a corporation, made the highest and best bid for the said property and purchased the same for the amount due on the said indebtedness, less the sum of $5,000 which is still due and unpaid. Thereupon the said trustees, in pursuance of the terms of the said deed of trust, duly conveyed the said property to the said Patrick Walsh & Sons Incorporated, a corporation, and it ever since has been and now is the owner thereof, and all adverse claims of the defendants thereto are without right. The said Patrick Walsh & Sons Incorporated is a corporation formed and controlled by the said Patrick Walsh, and all the stock thereof is owned or controlled by him, and plaintiffs W. M. Kearney and Patrick Walsh received no money whatever upon said sale, and the said cor-

poration holds the said land for their use and benefit.

XVIII.

That the complainants have no plain, speedy or adequate remedy in the ordinary course of law.

WHEREFORE, complainants pray:

1. That it be adjudged that the defendants and the estate of Thomas Hill, deceased, have no right, title, interest or estate in or to the said property, and that they be enjoined and restrained from conveying or encumbering the same as the property of Thomas [10] Hill or of his estate, and that the title of plaintiffs to the said property be quieted against the said defendants.

2. That, if it should be held that the said plaintiffs failed to obtain a valid first lien on the fee-simple title to the said property by the said deed of trust, Exhibit "B," they be subrogated to the said liens of the said Richard Kirman and Walter J. Harris and the said Georgiana F. Lonkey.

3. That it be adjudged that the defendants and the said Thomas Hill and his estate are estopped from denying the delivery of the said deed, Exhibit "A," and the title of the said Mary C. Hill and the validity of the said deed of trust, Exhibit "B."

4. That, if it should be held by the court that the said plaintiffs are not the owners of the said property, but that they are entitled to be subrogated to the said liens of Richard Kirman and Walter J. Harris and Georgiana F. Lonkey, that the Court order said property to be sold, and that the same be sold under the direction of the Court, and

that the proceeds of the said sale be applied and paid to the plaintiffs in discharge of the amount advanced by them upon the said liens, together with interest thereon, and that any balance thereof be paid to the defendants, and that the said plaintiffs in that event have judgment against the defendants other than Mary C. Hill as administratrix of the estate of Thomas Hill, deceased, for any deficiency remaining under the said deed of trust, Exhibit "B."

5. That, if it should be held by the court that the said plaintiffs are not the owners of the said property, it be adjudged that any right or title in or to the said property to which the said Mary C. Hill or her said children might be or become entitled as heirs at law of said Thomas Hill, deceased, be declared to be subject to the said deed of trust, Exhibit "B"; and that any money to [11] which the said Mary C. Hill or her children might otherwise be or become entitled by reason of the sale of the said property in the matter of the estate of Thomas Hill, deceased, be declared to be subject to the said deed of trust, Exhibit "B."

6. That if it should be held by the Court that the said sale of said property did not pass title to said property to plaintiff Patrick Walsh & Sons Incorporated, the said sale be vacated and set aside, and plaintiffs recover judgment for the full amount of said indebtedness against the defendants other than the administratrix of the estate of Thomas Hill, deceased.

7. That the complainants recover their costs of suit herein, and for such other and further relief as may be meet in the premises and agreeable to equity.

W. M. KEARNEY,
N. J. BARRY,
EDWARD F. TREADWELL,
Solicitors for Complainants. [12]

EXHIBIT "A."

THIS INDENTURE, made this 15th day of December, 1917, BETWEEN Thomas Hill of Lassen County, California, the party of the *party of the* first part, and MARY C. HILL, his wife of the same County and State, the party of the second part:—

WITNESSETH: That the said party of the first part, for and in consideration of the sum of Ten ($10.00) Dollars, lawful money of the United States to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, and to her heirs and assigns forever, all those certain lots, pieces and parcels of land, situate in the County of Lassen, State of California, and described as follows, to wit:

The W. ½ of NW. ¼, SE. ¼ of NW. ¼ and the SW. ¼ of Section 2; the E. ½, SW. ¼, S. ½ of NW. ¼ and the NW. ¼ of NW. ¼ of Section 3; the E. ½, S. ½ of SW. ¼ and the NE. ¼ of SW. ¼ of Section 4; the E½ of NE. ¼ and the SE. ¼ of Section 8; the N. ½, N. ½ of SE. ¼ and the W. ½

of SW. ¼ of Section 9; the N. ½ of N½ and the SW. ¼ of NW. ¼ of Section 10; the W. ½, W. ½ of E. ½ and the E. ½ of SE. ¼ of Section 11; the NE. ¼ of NW. ¼ and the W. ½ of NE. ¼ of Section 14; also a piece of land bounded as follows: Beginning at a point 10 chains west of the corner of Sections 11–12–13 and 14, and running thence south 15 chains; thence south 58 degrees 45′ West 11.72 chains to the quarter-quarter line; thence north along said quarter-quarter line 21.10 chains to the line between Sections 11 and 14; thence east 10 chains to the place of beginning, being in Section 14, all of said land above described being in Township 31 North of Range 12 East, M. D. M.

Also the SE. ¼ of SE. ¼ of Section 34, and the W. ½ of SW. ¼ of Section 35, in Township 32 North of Range 12 East, M. D. M. [13]

Also the N. ½ of SW. ¼ of Section 2, and the E. ½ of SE. ¼ of Section 3, in Township 31 North of Range 11 East, M. D. M.

Containing in all 3,218.58 acres of land, more or less according to Government Survey.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all the water and water rights incident thereto, and the rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises, with the appurtenances, unto the said party of the second part, her heirs and assigns FOREVER.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

THOMAS HILL.

(Ninety-five Dollars Documentary Stamps affixed and cancelled.)

State of California,
County of Lassen,—ss.

On this 15th day of December, in the year One Thousand Nine Hundred and Seventeen, before me, Alcesta Lowe, a Notary Public, in and for the County of Lassen, personally appeared Thomas Hill, known to me to be the person whose name is subscribed to the within instrument, and he duly acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal at my office in the County of Lassen, the day and year in this certificate first above written.

[Seal] ALCESTA LOWE,
Notary Public in and for the Co. of Lassen, State of California.

[Endorsed]: Recorded at the request of Cleveland Hill August 8, 1922, at 30 min. past 2 o'clock P. M. at page 266 in Book 9 of Deeds, Lassen County Records, C. L. Ramsey, Recorder, By Grace B. Ramsey, Deputy. [14]

EXHIBIT "B."

THIS DEED OF TRUST, made and entered into this 20th day of December, A. D. 1922, between

MARY C. HILL, a widow, and MRS. SADIE CASE, CLEVE HILL, JOSEPH HILL, ROBERT ELMER HILL, THOMAS GAY HILL, LAWRENCE HILL, JESSIE I. HILL, JIMMIE O. HILL, FLORENCE HILL DOUGLASS, HUBERT W. HILL, MILDRED L. HILL, CHRISTINE V. DeFOREST and MAUD B. McGREGOR by MARY C. HILL their attorney in fact under power of attorney, all of Lassen County, State of California, parties of the first part, and THOMAS A. KEARNEY, of Reno, Washoe County, Nevada, and JOHN M. WALSH of Austin, Lander County, Nevada, parties of the second part, and PATRICK WALSH, of Austin, Lander County, Nevada, and W. M. KEARNEY, of Reno, Washoe County, Nevada, parties of the third part,

WITNESSETH:

That the said parties of the first part have granted, bargained, sold and convey, and do hereby grant, bargain, sell and convey, unto the parties of the second part, in joint tenancy, and to the survivor of them, their successors and assigns, all that certain real property situated in the County of Lassen, State of California, and described as follows:

> The W. ½ of NW. ¼, SE. ¼ of NW. ¼ and the SW. ¼ of Section 2; the E. ½, SW. ¼, S. ½ of NW. ¼ and the NW. ¼ of NW. ¼ of Section 3; the E. ½, S. ½ of SW. ¼ and the NE. ¼ of SW. ¼ of Section 4; the E. ½ of NE. ¼ and the SE. ¼ of Section 8; the N. ½,

N. ½ of SE. ¼ and the W. ½ of SW. ¼ of Section 9; the N. ½ of N. ½ and the SW. ¼ of NW. ¼ of Section 10; the W. ½, W. ½ of E. ½ and the E. ½ of SE. ¼ of Section 11; the NE. ¼ of NW. ¼ and the W. ½ of NE. ¼ of Section 14; also a piece of land bounded as follows: Beginning at a point 10 chains west of the corner of Sections 11–12–13 and 14, and running thence South 15 chains; thence South 58° 45′ West, 11.72 chains to the quarter-quarter line; thence north along said quarter-quarter line 21.10 chains to the line between Sections 11 and 14; thence east 10 chains to the place of beginning, being in said Section 14, all in Township 31 North, Range 12 East, M. D. M. [15]

Also the SE. ¼ of SE. ¼ of Section 34, and the W. ½ of SW. ¼ of Section 35, in Township 32 North, Range 12 East, M. D. M.

Also the N. ½ of SW. ¼ of Section 2, and the E. ½ of SE. ¼ of Section 3, in Township 31 North, Range 11 East, M. D. M., containing in all 3,218.58 acres, more or less according to Government Survey.

TOGETHER with all water and water rights, ditches and ditch rights, easements and privileges appurtenant and incident thereto or used or useful in connection with the aforesaid premises.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or hereafter to be placed thereon, or in any-

wise appertaining; and, also all the estate, right, title and interest, or other claim or demand, as well in law as in equity, which the parties of the first part now have, or may hereafter acquire of, in or to the said premises, or any part thereof, with the appurtenances, hereby abandoning all right of homestead in and to said premises and hereby expressly waiving any and all equity of redemption and agreeing to warrant and defend the title to the same.

TO HAVE AND TO HOLD unto the said parties of the second part, as joint tenants, with the right of survivorship, as such, their successors and assigns, IN TRUST, NEVERTHELESS, for the uses and purposes hereinafter limited and described; namely:

This Deed of Trust, however, is intended as a deed of trust and mortgage to secure the payment of two promissory notes in the words and figures, following, to wit:

"$8,000.00 Reno, Nevada,
December 20th, 1922.

McDow xx "One year after date, without grace, for value received, we, or either of us, promise to pay to W. M. KEARNEY, or order, at Reno, Nevada, the sum of Eight Thousand Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of eight per cent per annum from date until paid. Interest payable semi-annually, also after judgment. [16]

"The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker *of* makers thereof or either of them. In the event of the non-payment of this said note at maturity, or its collection by suit, we, or either of us, agree to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end bind ourselves, our heirs, executors, administrators and assigns forever. For the purpose of attachment or levy of execution, this note shall be payable wherever we, or either of us, may be situated, at the option of the holder.

"MARY C. HILL.
"MRS. SADIE CASE.
"CLEVE HILL.
"JOSEPH HILL.
"ROBERT ELMER HILL.
"THOMAS GAY HILL.
"LAWRENCE HILL.
"JESSIE I. HILL.
"JIMMIE C. HILL.
"FLORENCE HILL DOUGLASS.
"HUBERT W. HILL.
"MILDRED L. HILL.
"CHRISTINE V. DeFOREST.
"MAUD B. McGREGOR.
"By MARY C. HILL,
"Their Attorney-in-fact."

($1.60 Documentary Stamps cancelled.)

"$42,000.00 Reno, Nevada,
December 20th, 1922.

McDow xx "Three years after date, without grace, for value received, we, or either of us, promise to pay to PATRICK WALSH, or order, at Austin, Nevada, the sum of Forty-two Thousand Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of eight per cent. per annum from date until paid. Interest payable semi-annually, also after judgment.

"The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker of makers thereof, or either of them. In the event of the non-payment of this said note at maturity, or its collection by suit, we, or either of us, agree to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end bind ourselves, our heirs, executors, administrators and assigns forever. For the purpose of attachment or levy of execution, this note

shall be payable wherever we, or either of us, may be situated, at [17] the option of the holder.

"MARY C. HILL.
"MRS. SADIE CASE.
"CLEVE HILL.
"JOSEPH HILL.
"ROBERT ELMER HILL.
"THOMAS GAY HILL.
"LAWRENCE HILL.
"JESSIE I. HILL.
"JIMMIE O. HILL.
"FLORENCE HILL DOUGLASS.
"HUBERT W. HILL.
"MILDRED L. HILL.
"CHRISTINE V. DeFOREST.
"MAUD B. McGREGOR.
"By MARY C. HILL,
"Their Attorney-in-fact."

($8.40 Documentary Stamps Cancelled.)

To secure the payment to the said parties of the third part, of the sum of Eight Thousand Dollars ($8,000.00) and Forty-two Thousand Dollars ($42,000.00), respectively, lawful money of the United States of America, and interest thereon according to the terms of the two promissory notes set forth herein, made, executed and delivered by the said parties of the first part and payable to the order of the said parties of the third part respectively; also, to secure the payment of any and all sums of money, checks, bills, promissory notes, bonds, liens, balances of account, over-drafts or other indebtedness, which are now, or may hereafter during the

continuance of this trust, be, or become due or owing from the parties of the first part, or either of them, to the said parties of the third part, or for which said parties of the first part, or either of them, may be, or shall become in any manner liable to the said parties of the third part, together with interest on all of such indebtedness, from the date and creation of the same to the date of the repayment to the said parties of the third part, at the rate of eight per cent. per annum on all such indebtedness, or such other rate as may be agreed upon where the indebtedness is evidenced [18] by an instrument in writing. Also, to secure the repayment, on demand, of any sum, or sums, advanced at any time during the continuance of this trust by the party of the third part, for the payment of any taxes, assessment, liens or encumbrances now subsisting or which may hereafter be levied or imposed upon said premises, or any part thereof, which may, in the judgment of the parties of the third part, affect said premises or this trust. Also, to secure the repayment, on demand, of any and all sums paid out by the parties of the second part or third part, in intervening in, prosecuting or defending any action or proceeding, wherever, in their judgment, it may be necessary to do so, in order to protect the title to said property or this trust. Also, to secure the repayment by parties of the first part, of the expenses incurred for such repairs or prevention of waste upon said premises as may have been deemed necessary by parties of the third part, or their successors or assigns. Also, to secure the pay-

ment of interest on all of said advances and expenses from the time they are made or incurred to the time of repayment, at the rate of eight per cent. per annum, payable semi-annually, after the 20th day of December, 1922, or *w*uch other rate as may be expressly agreed upon in writing.

All indebtedness and advances not evidence by any instrument in writing wherein it is otherwise provided and the interest thereon, shall be due and payable, on demand, in lawful money of the United States of America.

The parties of the first part have full notice that the parties of the second part are relatives of the parties of the third part, and hereby consent that they act as Trustees and parties of the second part, and waive all objections thereto. The parties of the first part shall be entitled only to [19] notice of the names and addresses of any substituted Trustee or Trustees at the time or after substitution is made, and hereby consent to this provision.

In case the parties of the first part shall well and truly pay, or cause to be paid at maturity, to the parties of the third part, or their successors or assigns, in lawful money as aforesaid, the promissory notes, and all other indebtedness hereina*f*ore mentioned, when the same shall become due, with interest as hereintofore specified, and all sums paid out and expended, together with interest, on demand, as hereinbefore provided, then the parties of the second part, the survivor of them, their successors and assigns, shall reconvey all the estate in said premises, to them by this instrument granted,

to the parties of the first part, their heirs or assigns, at their request and cost.

If default shall be made in the payment of said notes first mentioned, or any portion thereof, or any installment of interest thereon when due, or any indebtedness evidenced by any instrument in writing, as aforesaid, or in the reimbursement of any moneys, as herein provided to be paid out and expended, or any advances for taxes, liens, encumbrances, etc., or any other sum due to parties of the third part, with the interest thereon, on demand, as hereinabove expressed, then it shall be lawful for the said parties of the second part, or the survivor of them, their successors or assigns, on the application of the parties of the third part, or their successors or assigns, to sell the above granted premises, or such part thereof, as in their discretion, they shall find it necessary to sell in order to accomplish the objects of this trust, in the manner following, to wit: [20]

They shall publish notice of the time and place of such sale, with a description of the property to to be sold, at least one time a week for three successive weeks, in some newspaper, published in the County of Lassen, State of California, and may from time to time, postpone such sale by publication, and on the day of sale so advertised, or to which such sale may be postponed, at the place named, they may sell the property so advertised, as a whole or in subdivisions, as the parties of the second and third part may deem best, at public auction, in any county where any part of said property may be

situated, in the State of California, to the highest bidder for cash, in lawful money of the United States of America; and at such sale the holder of any note or instrument in writing, or of any of the indebtedness, or any one who has made any of the advances hereinbefore mentioned, or the parties of the third part, may bid and purchase the whole or any part of said premises.

And the parties of the second part, or the survivor of them, their successors or assigns, are hereby authorized to execute and shall execute, and after due payment, made, shall deliver to the purchaser or purchasers, at such sale, deed or deeds of grant, for the property sold, and in any such deed, are authorized to recite any and every matter of fact necessary to authorize such sale and deed and such sale and deed and such recital shall be conclusive evidence against parties of the first part of the existence of the matters so recited and of every other matter or fact necessary, to authorize such sale, whether such matter or fact is recited in such deed or not, and any such deed or deeds, with such recitals therein, shall be effectual and conclusive against said parties of the first part, their heirs and assigns, and all other persons. And the receipt for the purchase [21] money contained in any deed executed to a purchaser at such sale, as aforesaid, shall be sufficient discharge of such purchaser from all obligation to see to the proper application of the purchase money according to this trust.

Out of the proceeds of such sale, the parties of the second part shall:—

FIRST: Pay the expenses of sale, including the cost of publication and counsel fee of an amount equal to five (5) per cent of the amount due and remaining unpaid, in lawful money of the United States of America, which shall become due upon any default made by the parties of the first part, in any of the payments aforesaid. And, also such sums, if any, as the parties of the second part, or the parties of the third part, shall have paid or become liable to pay for procuring an abstract, or continuation thereof, or certificate, or report of the title to said real property, or any portion thereof, subsequent to the execution of this deed of trust.

SECOND: They shall retain a sufficient sum to discharge all the indebtedness and interest due from parties of the first part to the parties of the third part, or their successors or assigns, as hereinbefore specified; and all sums which may have been advanced or expenses incurred by parties of the third part, or parties of the second part, for any of the purposes hereinbefore specified, with the interest thereon, and apply the same in pursuance of this trust, to wit: eight-fiftieths (8/50) to W. M. Kearney, his heirs, successors or assigns, and forty-two fiftieths (42/50) to Patrick Walsh, his heirs, successors or assigns, such representing their respective interests therein.

THIRD: The surplus, if any, they shall pay to the parties of the first part, their successors or assigns, on demand. [22]

IT IS EXPRESSLY COVENANTED that the parties of the third part, may from time to time,

appoint other trustee or trustees, to excute the trusts hereby created; and upon such appointment and a conveyance to them, by the parties of the second part, the survivor of them, their successors or assigns, the new trustees shall be vested with all the title, interest, power, duties and trusts in the premises hereby vested in or conferred upon the parties of the second part. Such new trustees shall be considered the successors and assigns of the parties of the second part, within the meaning hereof.

The parties of the second part, or the parties of the third part, may commence, prosecute, intervene in, or defend any action or proceeding in any court of competent jurisdiction, whenever, in their judgment, it may be necessary to do so, in order to protect the title to said property, and may at any time, at their option, commence and maintain suit in any court of competent jurisdiction to obtain the aid and direction of said court in the execution by them of the trusts, or any of them herein expressed or contained, and may in such suit obtain orders or decrees, interlocutory or final, of said court, directing the execution of said trusts, and confirming and approving their acts, or any of them, or any sales or conveyances made by them, and adjudging the validity thereof, and directing that the purchasers of the land and premises sold and conveyed be let into immediate possession thereof, and providing for orders of court or other process, requiring the sheriff of the county in which said lands and premises are situated to place and maintain the said purchasers to quiet and peaceable possession of the

lands and premises so purchased by them, and the whole thereof.

In case default be made in the payment of any sum or [23] sums hereinabove mentioned, the Trustees, their successors or assigns, shall be entitled at any time, at their option, and either by themselves, or by their duly authorized agent, to enter upon and take possession of the above granted premises, or any part thereof, and remove all persons therefrom, and to do and perform such acts of repair or cultivation, as may be necessary or proper to conserve the value thereof, and to collect and receive the rents, issues and profits thereof, and apply the same in the manner hereinbefore specified in respect of proceeds of sale of said premises, and to do such other acts and to exercise such other power in respect to said premises as said trustees may deem necessary or proper to conserve the value thereof, and the expenses therein incurred shall be deemed to be a portion of the expense of this trust, and secured thereby as hereinbefore provided:

The Trustees may at any time, upon request of the parties of the third part, reconvey to the grantors, their heirs or assigns, any portion of said premises without affecting the personal liability of any person, or the payment of any of said indebtedness and without affecting the title to the remaining premises.

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals the day and year first above written.

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals the day and year first above written.

MARY C. HILL. (Seal)
MRS. SADIE CASE. (Seal)
CLEVE HILL. (Seal)
JOSEPH HILL. (Seal)
ROBERT ELMER HILL. (Seal)
THOMAS GAY HILL. (Seal)
LAWRENCE HILL. (Seal)
JESSIE I. HILL. (Seal)
JIMMIE O. HILL. (Seal)
FLORENCE HILL DOUGLASS. (Seal)
HUBERT W. HILL. (Seal)
MILDRED L. HILL. (Seal)
CHRISTINE V. DeFOREST. (Seal)
MAUD B. McGREGOR. (Seal)
By MARY C. HILL, (Seal)
Their Attorney-in-fact. [24]

We accept the foregoing trust.
Dated Dec. 20th, 1922.

JOHN M. WALSH, Trustee.
THOMAS A. KEARNEY, Trustee.

State of California,
County of Lassen,—ss.

On this 20th day of December, 1922, personally appeared before me, Geo. N. McDow, a Court Commissioner in and for the said county of Lassen, Mary C. Hill, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that she executed

the same freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the county of Lassen, the day and year in this certificate first above written.

[Seal] GEO. N. McDOW,
Court Commissioner.

State of California,
County of Lassen,—ss.

On this 20th day of December, 1922, personally appeared before me, Geo. N. McDow, a Court Commissioner in and for the said county of Lassen, Mary C. Hill, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglass, Hubert W. Hill, Mildred L. Hill, Christine V. DeForest and Maud B. McGregor, and who acknowledged to me that she subscribed the names of Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglass, Hubert W. Hill, Mildred L. Hill, Christine V. DeForest and Maud B. McGregor thereto as principals, and her own name as attorney-in-fact, and who acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the County of Lassen, the day and year in this certificate first above written.

[Seal] GEO. N. McDOW,
Court Commissioner.

[Endorsed]: Filed Dec. 17, 1928. [25]

[Title of Court and Cause.]

ANSWER TO PLAINTIFFS' AMENDED COMPLAINT.

Now come the defendants above named and each and all of them, except the defendants designated by fictitious names, and answering plaintiffs' amended complaint herein filed by leave of the Court on December 17, 1928, suggest and allege:

(a) That said amended complaint fails to state facts sufficient to constitute a cause of action in equity, or any cause of action, against the said defendants, or either or any of them.

(b) That said amended complaint wholly fails to state facts sufficient to constitute a cause of action for the subrogation of the plaintiffs, or either of them, to the alleged liens of the said Richard Kirman and Walter J. Harris, and/or the said Georgiana F. Lonkey; and that said amended complaint states no facts sufficient to support, or upon which to base, a finding or judgment that the [26] said plaintiffs are entitled to be subrogated to the

said alleged liens of the said Richard Kirman and Walter J. Harris and/or the said Georgiana F. Lonkey.

(c) That the said amended complaint wholly fails to state facts sufficient to constitute a cause of action against the defendant, Mary C. Hill, as administratrix of the estate of Thomas Hill, deceased; and does not state facts sufficient to support a finding or decree adjudging that the said Thomas Hill and his estate are estopped from denying the delivery of the said deed, Exhibit "A," and/or the title of the said Mary C. Hill, and/or the validity of the said deed of trust, Exhibit "B."

(d) That said amended complaint does not state facts sufficient to constitute a cause of action for a decree quieting the plaintiffs' title to the lands described therein.

And said defendants, for answer to the specific allegations of the said amended complaint admit, deny and allege as follows, to wit:

I.

Admit the allegations of paragraphs I to VI, inclusive, of the said amended complaint.

II.

Admit that on the 15th day of December, 1917, the said Thomas Hill executed a deed conveying the said property to his wife, Mary C. Hill, and delivered the said instrument to one Grover C. Julian with instructions to hold the same until the death of the said Thomas Hill and then hand the same to the said Mary C. Hill; but deny that the said

deed was, on the said 15th day of December, 1917, or at any other time prior to the death of said Thomas Hill, duly delivered to the said Mary C. Hill in the manner alleged, or otherwise, and/or with the intent and purpose, or intent or purpose, that title to the said property should vest in the said Mary C. [27] Hill, subject to a life estate in the said Thomas Hill.

In this connection defendants allege that the said deed to his wife, Mary C. Hill, was executed by said Thomas Hill and left in the possession of one Grover C. Julian to be delivered after his death, with the intent and purpose that title to the said property should remain in said Thomas Hill until his death and vest in the said Mary C. Hill only upon his death and the delivery to her of the said deed. That, after the execution of said deed, and at all times until the death of said Thomas Hill on July 22, 1922, the said Thomas Hill remained in possession of said property and operated the same and claimed to be the owner thereof and to be vested with title thereto.

III.

Admit that the plaintiffs, W. M. Kearney and Patrick Walsh, loaned to said Mary C. Hill the sum of Fifty Thousand ($50,000) Dollars, evidenced by two promissory notes and secured by a certain trust deed, as alleged in paragraphs VIII, IX and X of said amended complaint; and in this connection allege that said promissory notes and said trust deed were executed by the children of said Mary C. Hill at the direction and request of

the plaintiff, W. M. Kearney. That the said defendants, the children of Mary C. Hill, who signed said promissory note, are heirs at law of said Thomas Hill; and defendants are informed and believe, and on such information and belief allege, that at the time said loan was made to Mary C. Hill, the plaintiffs, W. M. Kearney and Patrick Walsh, had full knowledge and information as to the fact of the death of Thomas Hill and that the said deed from Thomas Hill to Mary C. Hill, his wife, was not delivered until after the death of Thomas Hill; and that the said children of Mary C. Hill, and heirs at law of said Thomas Hill, were requested and required by said W. M. Kearney to sign said promissory notes and trust deed for the reason that he, [28] the said W. M. Kearney, then knew and was fully informed that the said defendants, and each of them, were heirs at law of said Thomas Hill, and then had a vested interest in the said real property.

That the defendant, Mary C. Hill, the widow of Thomas Hill, deceased, delayed the commencement of any proceedings to probate the estate of Thomas Hill, deceased, until about the month of May, 1923, and in failing to probate the said estate prior to the execution of the said promissory notes and trust deed, acted upon the advice of the plaintiff, W. M. Kearney, who is an attorney at law, and who advised her in all matters pertaining to the execution of said promissory notes and trust deed; and that she relied upon his advice and direction and did not at that time, nor until after the com-

pletion of said loan, seek independent legal advice with reference to the necessity of commencing proceedings to probate the estate of Thomas Hill, deceased.

IV.

Admit the allegations of paragraph XI of said amended complaint.

V.

As to paragraph XII, deny that said plaintiffs so loaned and advanced the said money for the express purpose of paying and discharging said liens, except that, at the direction of said Mary C. Hill, such portion only of said money included in said loan as was necessary to secure the discharge of said liens alleged in paragraph XI, was to be and was applied for that purpose.

That from said $50,000 loan, the sum of $32,050, and no more, was paid to the said Richard Kirman and Walter J. Harris, in satisfaction of their indebtedness and the lien against said property, and the further sum of $10,000, and no more, was paid therefrom to the said Georgiana F. Lonkey, or to her use and benefit, as a consideration for the satisfaction of and release of her said lien against said property. [29]

That upon the payment of said sums of money as aforesaid, and on or about the 24th day of December, 1922, the said liens upon the said property alleged in paragraph XI of said amended complaint, were fully discharged and released of record, and the same have never been questioned or revived. That no assignment or transfer of said liens to the

plaintiffs, or any other person, has ever been made by said lien claimants.

VI.

As to the allegations of paragraph XIII of said amended complaint, defendants have no knowledge, information or belief sufficient upon which to answer the same, and basing their denial upon that ground, deny each and all of the allegations thereof; and allege that at the time the said plaintiffs so loaned said money to said Mary C. Hill, they had full knowledge and information as to the record title to said property and that the title thereof stood of record in the name of Mary C. Hill, subject to administration in the probate courts of the State of California, to payment of creditors' claims and distribution by decree of the probate court to the heirs of Thomas Hill, deceased, or their successors in interest.

VII.

Admit that on the 25th day of May, 1923, Mary C. Hill was appointed administratrix of the estate of Thomas Hill, deceased; and in this connection allege that it was legally necessary that an administration of said estate be had for the settlement and payment of inheritance tax liens against said property, and for the adjudication and payment of claims against the estate of Thomas Hill, deceased; that immediately after her appointment as such administratrix, said Mary C. Hill, pursuant to the provisions of the Code of Civil Procedure of the State of California, duly published Notice to Creditors of said Thomas Hill, deceased, as required by

law, and thereafter and within the time prescribed by law, numerous claims [30] against the said decedent were filed by creditors and approved and allowed as approved by law. That the aggregate amount of such claims so filed, approved and alleged, was the sum of $48,391.88. That the assets of said estate, exclusive of the real property described in plaintiffs' complaint, were and are insufficient to pay the said claims in full, and the costs, charges, and expenses of administration.

Admit that defendants claim that the said Thomas Hill was the owner of the said land at the time of his death, but deny that they have threatened to convey the said land as the property of the said Thomas Hill, or otherwise, except that the defendant, Mary C. Hill, as administratrix of the estate of Thomas Hill, deceased, did, by published notice of sale in said probate proceedings, on or about the 10th day of September, 1925, offer for sale all the right, title and interest of said Thomas Hill, deceased, in and to all the real property belonging to said estate.

Deny that the claims of defendants made by them of the said property as the property of said Thomas Hill and/or his estate will create a cloud upon any title thereto claimed or acquired by plaintiffs; and allege that said lands and any title thereto acquired by plaintiffs, by or through or under said trust deed, has at all times been, and still is subject to administration in the probate court, and the payment of the creditors of said Thomas Hill and expenses of administration.

IX.

As to the allegations of paragraph XV of said amended complaint, defendants deny that said Thomas Hill and/or his estate, and/or the defendant, Mary C. Hill, as administratrix of the estate of Thomas Hill, deceased, are estopped from denying and/or disputing the due delivery of the said deed from said Thomas Hill to Mary C. Hill; admit the execution and delivery of said deed to one Grover [31] C. Julian, but deny that the said Thomas Hill and/or the said Mary C. Hill thereby placed the said instrument in such a position that the same would, in the natural order of events, be recorded and become a public record; deny that the said complainants relied upon the said instrument and/or record thereof, and deny that they believed that the same had been duly delivered, and deny that they had no knowledge or information to the contrary; and deny that they advanced said money on the faith of said instrument; and deny that, at the time of so loaning said money, the said defendants had no knowledge, notice or information in any way disparaging the apparent title of said Mary C. Hill to the said land; and deny that they advanced the said money in good faith, or otherwise, in reliance upon said title.

On the contrary, defendants allege that the complainants, upon the making of said loan, had full knowledge and information as to the apparent title and interest of all the defendants in said land as the heirs at law of said Thomas Hill, and that they made said loan and advanced said money in reliance

upon the title and interest in said property of all of these defendants, and not upon the title and claims of said Mary C. Hill alone.

X.

Defendants deny that no part of the interest due upon said promissory notes has ever been paid, and in this connection allege that all interest due on said two promissory notes was by the defendants fully paid to the first day of February, 1924.

XI.

Deny that the said John M. Walsh and Thomas A. Kearney, as trustees under the said deed of trust, sold all of the said property in accordance with the provisions of the said deed of trust, and in this connection defendants allege:

That subsequent to the filing of defendants' original [32] answer herein, to wit, on or about the 14th day of June, 1926, the plaintiff, Thomas A. Kearney, claiming to act as trustee under authority of the deed of trust mentioned and set out in plaintiffs' bill of complaint herein attempted and pretended to sell the lands and premises covered by said deed of trust. That at said attempted and pretended sale the defendant, John M. Walsh, who was then alive and under no disability, and who was cotrustee with said Thomas A. Kearney, under said deed of trust, was not present and did not participate in said pretended sale.

Deny that, pursuant to said sale and the deed executed by said trustees as alleged in paragraph XVII of said amended complaint, the said Patrick

Walsh & Sons, Incorporated, a corporation, ever since has been, and now is the owner thereof, and/or that all adverse claims of the defendants thereto are without right.

XII.

Deny that the complainants have no plain, speedy and/or adequate remedy in the ordinary course of law.

For a further and separate answer and defense to plaintiff's alleged cause of action and claim to the right to be subrogated to the rights and liens of said Richard Kirman and Walter J. Harris, and the right and lien of said Georgiana F. Lonkey, the defendants allege:

That the said claim of and cause of action for the subrogation of plaintiffs to the rights and liens of said Richard Kirman and Walter J. Harris and said Georgiana F. Lonkey, is barred by the provisions of Section 337 of the Code of Civil Procedure of the State of California. [33]

WHEREFORE, defendants pray:

1. That plaintiffs take nothing upon their claim and cause of action to quiet the title of plaintiffs to the said property.

2. That the claim of the right of subrogation of plaintiffs to the liens of the said Richard Kirman and Walter J. Harris and the said Georgiana F. Lonkey be denied.

3. That it be adjudged that the said Thomas Hill and his estate are not estopped from denying the delivery of said deed.

4. That any sale of said property under the decree or order of this court be made for the purpose of first paying the creditors of the estate of Thomas Hill and the expenses of administration before the same is applied to the payment of plaintiffs' claims; and

5. That the defendants recover their costs of suit herein.

J. E. PARDEE,
R. M. RANKIN,
Solicitors for Defendants. [34]

State of California,
County of Lassen,—ss.

J. E. Pardee, being first duly sworn, says:

That on January 9, 1929, affiant mailed to Edward F. Treadwell, Esq., one of the solicitors for the plaintiffs above named, a true copy of the foregoing answer to plaintiffs' amended complaint, addressed to said Treadwell at his office in the Standard Oil Building, San Francisco, California; and that the same was mailed in the U. S. postoffice at Susanville, California, and that the postage thereon was fully prepaid.

[Seal] J. E. PARDEE.

Subscribed and sworn to before me this 9th day of January, 1929.

J. A. PARDEE,
Notary Public.

[Endorsed]: Filed Jan. 10, 1929. [35]

[Title of Court and Cause.]

Before KERRIGAN, District Judge.

October 18, 1928.

MEMORANDUM OPINION.

On examination of the record in this case, I reach the following conclusions:

1. There was no delivery of the deed from Thomas Hill to his wife, Mary C. Hill during the lifetime of the grantor.

2. Plaintiffs are not entitled to quiet title as against Mary C. Hill, as administratrix of the Estate of Thomas Hill.

3. Plaintiffs are entitled to a decree quieting title as against Mary C. Hill, individually, and against the other heirs of Thomas Hill joining in the trust deed out of which plaintiffs' claim arises.

4. Plaintiffs are further entitled to a decree against Mary C. Hill, individually, and the heirs above mentioned for the deficiency judgment sued for, in the sum of $5,000, with interest from June 14, 1926.

It appears from the evidence herein that various claims allowed by the probate court against the Estate of Thomas Hill remain unpaid. It appears probable that there will be necessary a probate sale of this property to satisfy these claims. In order to protect the rights of all parties to the present suit, the decree to be drawn should contain a provision that in the event of a probate sale of the property,

or upon final distribution, the parties may come in at the foot of the [36] decree for a final determination and adjustment of their interests as they then appear.

Costs to Mary C. Hill, as administratrix of the Estate of Thomas Hill. The other parties to bear their own costs.

So ordered.

KERRIGAN,
District Judge.

(Not to be reported.)

[Endorsed]: Filed Oct. 18, 1928. [37]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 17th day of December, in the year of our Lord one thousand nine hundred and twenty-eight. Present: the Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—DECEMBER 17, 1928—ORDER GRANTING MOTIONS, ETC.

After hearing attorneys for the respective parties, IT IS ORDERED that the motion to set aside submission, motion for leave to file amended complaint, on the calendar this day in the above-entitled

case, be and the same are hereby granted, with leave to answer said amended complaint within fifteen days. [38]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 6th day of May, in the year of our Lord one thousand nine hundred and twenty-nine. Present: the Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—MAY 6, 1929—TRIAL.

These cases came on this day for trial before Judge Kerrigan; W. G. Treadwell, Esq., appearing as attorney for plaintiff and defendant Walsh, et al., and J. E. Pardee and R. M. Rankin appearing as attorneys for plaintiff, Bank of Lassen, and defendant, Hill. After hearing Mr. Treadwell and no objection being made thereto, it was ordered that the two cases be consolidated for trial. Mr. Treadwell, on behalf of the plaintiff and defendant, Walsh introduced in evidence and filed the depositions of Seymour Case, Grover C. Julian and Miss Alcesta Lowe, and W. M. Kearney was sworn and testified in behalf of the plaintiffs, and plaintiffs rested. Attorneys for the respective parties, plaintiffs and defendant, Bank of Lassen called C. A.

Bridges and J. E. Pardee, who were sworn and testified, and plaintiffs and defendant introduced in evidence and filed their exhibits marked:

Defendants' Exhibit "B"—Note.
Defendants' Exhibit "C"—Mortgage.
Defendants' Exhibit "D"—Deposit Slip.
Defendants' Exhibit "E"—Bill of Sale.
Defendants' Exhibit "F"—Deed.
Defendants' Exhibit "G"—Reconveyance.
Defendants' Exhibit "H"—Release.
Defendants' Exhibit "I"—Affidavit of Publication.
Defendants' Exhibit "J"—Articles of Incorporation. [39]

and introduced in evidence and filed the deposition of Mary C. Hill, and rested. After hearing attorneys it was ordered that the case stand submitted, on briefs filed and to be filed in 15 and 5 days. [40]

[Title of Court and Cause—Cause Nos. 198—Eq., 208—Eq.] [41]

CONDENSED STATEMENT OF TESTIMONY AND EVIDENCE.

(In this statement the plaintiffs in case No. 198 and the defendants in case No. 208 will be referred to as the plaintiffs, and the defendants in case No. 198 and the plaintiffs in case No. 208 will be referred to as the defendants.)

Plaintiffs offered in evidence a certified copy of the deed dated December 15, 1917, by Thomas Hill to Mary C. Hill, recorded August 8, 1922, in Book 9 of Deeds, page 266, and the same was admitted in evidence and marked Plaintiffs' Exhibit 1, and is in all respects in accordance with Plaintiffs' Exhibit 1 attached to plaintiffs' complaint in case No. 198 and Defendants' Exhibit 2 attached to defendants' answer in case No. 208.

TESTIMONY OF GROVER C. JULIAN, FOR PLAINTIFFS.

I live in Susanville, California, and am an attorney at law, and have practiced law for twenty years. In 1917 I was residing and practicing law at Susanville, California. I knew Thomas Hill in his lifetime. Previous to that time I had acted as his attorney in various matters. I remember Mr. Hill coming into the office about the date of the deed dated December 15, 1917. I do not recall the exact date. Mary C. Hill, his wife, was with him. Mr. Hill handed me a deed and stated that it was a deed to the Willow Creek Ranch to Mrs. Hill; that I was to take that deed and hold it and keep it in my safe and hand it to Mrs. Hill on his death, to be then recorded. The deed was taken by me and placed in my *w*afe and kept until after the death of Thomas Hill. I do not remember all the conversation. It was not very extensive, but I do remember that Mr. Hill stated the nature of the deed and told me that I was to hold that deed, keep it in my possession and

(Testimony of Grover C. Julian.)

in my safe until his death, and then to hand it to Mrs. Hill for [42] recording. Mrs. Hill was present during all of the conversation. They came in together and went out together and were together in my private office during all of the conversation. He attached absolutely no conditions to the delivery of the deed to me. There was nothing said about any reservations whatever. There was nothing said as to his right to recall it. Some short time after the death of Mr. Hill, Cleve Hill, a son, came into the office, and said that his mother wanted the deed to the ranch property, and I delivered the deed to Cleveland Hill at that time. I have never seen the deed from that time to the present. I saw Mr. Hill at different times after that occasion and before he died. I saw him every once in a while in Susanville from that time until the time of his death. I never had any conversaton with him relative to the deed. He never said anything further about the deed. He never demanded the return of the deed. The deed was never mentioned by Mr. Hill to me. I am satisfied that this is the same deed that was in my possession and delivered to me by Mr. Hill and delivered by me to Cleveland Hill. When he gave the deed to me in the office that day I took one of my envelopes, a large envelope, and made a notation on the outside of the content of the envelope, that it was a deed from Thomas Hill to Mary C. Hill, for delivery on the death of Thomas Hill. The deed remained in the envelope until it was taken out of the envelope for handing to Cleve Hill. There were

(Testimony of Grover C. Julian.)

not any revenue stamps on it when I received it that I recall. No mention was made of revenue stamps. I did not ask Mr. Hill any questions. I have related all that occurred so far as I can recall. There might have been some additional talk there, but I think that I have given all of the substance of the conversation so far as I can remember it. I do not know when the stamps were put on. I have no information as to [43] that.

Cross-examination.

It was about the time of the execution of the deed that Mr. Hill and his wife came into my office. I don't remember whether it was the same date. It was immediately after the date the deed bears. I did not prepare the deed, myself. The deed was not prepared by me. It is my recollection that Mr. Hill brought this deed to me shortly after the date it bears, and the deed had just been executed, or signed and acknowledged prior to its delivery to me. Mrs. Hill came with him to my office at that time. I never had any conversation with Mr. Hill regarding the deed either in the presence of his wife, or otherwise, outside of the conversation when he handed me the deed. I don't recall the revenue stamps being on the deed and my impression is that they were not. I could not say how long after Mr. Hill's death I delivered that deed to Cleve Hill. I have no memorandum of the date; it was some little time after his death. My impression is it was possibly two or three weeks I could not say. I was

(Testimony of Grover C. Julian.)

still in Susanville when Mr. Hill died. After Mr. Hill died I did not communicate the fact to Mrs. Hill that I had the deed for her. Mrs. Hill did not communicate with me in any manner with reference to the deed prior to the time that Cleve Hill called for it. I did not become aware and was not informed that Mrs. Hill was looking for papers of that kind after Mr. Hill died. There was nothing ever said to me about it. The first communication I had from any of the Hills was when Cleve called for the deed. Of course, I knew all the time that the paper was in my office. I did not communicate with Mrs. Hill. I might say that I had done various business for Mr. Hill previous to that, and other attorneys had also done business for Mr. Hill. In connection with the settlement of his estate I did not know [44] who would be called on to do that, and I just waited until someone should say something to me about it. Between the date of the deed and the date of the death of Mr. Hill I did no business for Mr. Hill that I can recall. There was a matter of unfinished business, but it was inactive. There was also one matter that I do recall, and that was, we might say, inactive. I knew generally that Mr. Hill was in possession of the Willow Creek Ranch, was farming it, or was taking care of it, the same as he had in the past; at least, that was my understanding of the matter. The Willow Creek Ranch is the property described in the deed. [45]

TESTIMONY OF WILLIAM M. KEARNEY, FOR PLAINTIFFS.

I reside in Reno, Nevada, and am an attorney at law. Have been practicing about eleven years. I am one of the plaintiffs named in this action, one of the beneficiaries. I am acquainted with Mary C. Hill. I am acquainted with Patrick Walsh and was acquainted with John M. Walsh and Thomas A. Kearney during their lifetime. The loan represented by the trust deed was negotiated through me by Cleveland Hill, the elder son of Mary C. Hill, and Seymour Case, a son-in-law of Mrs. Hill, who is married to Mrs. Hill's eldest daughter. The Hills made a statement to me of the property out there before they made the loan. Prior to the time I made the main loan I received a letter from Mary C. Hill relative to the loan. I had advanced the sum of $8,000 to meet some emergency payments. Subsequently this letter was received, and before the main loan was made. It is in the handwriting of Seymour Case accompanying the letter you just handed me, dated October 18, 1922. That letter, I believe, is signed by Mary C. Hill, by Seymour Case, and by Cleveland Hill. The three signatures are on the letter. Mrs. Hill told me that this was her statement and that she authorized it.

(The letter and statement were thereupon admitted in evidence, marked Plaintiffs' Exhibit 2, and are as follows:)

PLAINTIFFS' EXHIBIT No. 2.

"Hills Meat Market,

Susanville, Cal. Oct. 19th, 1922.

Mr. W. M. Kearney,
Attorney at Law,
Reno, Nev.

My dear Kearney:

After considering your letter relative to the matter of a loan from Mr. Walsh will advise that we are still desirous of making the loan, but do not believe we should offer as permanent security any property or equities that are part of Mr. Hill's Estate. There would then remain the Willow Creek ranch with machinery, horses and all personal property connected with it. It would be difficult to include [46] any cattle as all of last years and this years calves have been branded with the Lonkey brand and there remain but a few on the ranch that carry the original, or Folsom, brand. There are now a considerable number of cattle in excess of the number acquired from Mrs. Lonkey, but as stated nearly all of them carry the Lonkey brand and Mrs. Lonkey will not consent to another mortgage being placed on any of the cattle if she is to release the second mortgage on the ranch and take a chattel mortgage on all cattle in lieu, as we have arranged for. Thus the security we could offer under a clear first mortgage would be the Willow Creek ranch with all improvements, appurtenances and personal property except cattle.

As Mr. Walsh has already been over the place he knows fairly well what is on it in the way of equipment so we need not undertake to describe it in detail here. We trust that he will see fit to make the loan on the security that can be given, and are gratified to know that he has faith in our ability and integrity as expressed in your letter.

Sorgi has not yet arrived so it seems very doubtful whether he will come out at all.

Awaiting your reply as to whether or not the loan will be made, we are

Very sincerely,
MARY C. HILL.
CLEVELAND HILL.
SEYMOUR CASE.

Financial Statement
Mary C. Hill and Thomas Hill Estate.
Sept. 25th, 1922.

Willow Creek Ranch owned by Mary C. Hill—area approx. 3300 acres, of which about 2000 acres is 1st class wild hay meadow, about 400 acres of grain land and remainder is pasture land most uncleared.

The water supply for this ranch is from Willow Creek which has its source in numerous springs which furnish nearly a constant flow throughout the year except during the spring run-off. During the period of normal flow about 1,500 miners inches of water under a 4-inch pressure is available for the ranch and during the spring run-off a much larger flow varying with the season.

A conservative estimate of the value of the ranch including all stock and improvements *if* $220,000.00

Obligations consist of:

First mortgage on Trust Deed held by the Farmers and Merchants Bank of Reno to secure two notes 30,000.00

Second mortgage to Georgiana F. Lonkey of Susanville, Cal. as security for cattle 27,200.00

Third mortgage held by W. M. Kearney of Reno as security for a note of... 8,000.00

(Have been assured that on the payment of $10,000 second mortgage will be released and chattel mortgage taken on cattle in lieu.)

Other property of Mary C. Hill consists of:

Real estate and improvements in Susanville, Cal. $10,000.00

Stock in Hill Land & Livestock Co..... 5,000.00

No indebtedness. [47]

Estate of Thomas Hill consists of:

Equity in Lonkey Ranch, Willow Creek Valley $12,000

Stock in Hill Land & Livestock Co. (including stock of a deceased son, est. not yet probated) 10,000

Hill's Meat Market in Susanville, value of equipment 8,000

Stock in Lassen Grain & Milling Co. of Susanville 2,000

(Testimony of William M. Kearney.)

Miscellaneous (consisting of several isolated tracts of land, and good accounts payable) 6,000

$38,000

Indebtedness.

Unsecured notes and all other outstanding obligations, approximately $15,000

Revenues for past year.

Net revenue of Meat Market not including wages to sons..... 6,000

(Will exceed that amt. this year due to increase of business.)

Net revenue of Willow Creek and Lonkey ranches not including wages of sons, approx. 15,000

(Revenue was mostly from pasture of outside stock. It could be doubled at least if the ranches were properly stocked.)

No net revenue from Hill Land & Livestock Company. Land most unimproved.)"

I had that letter and statement before I finally made the loan. This is the trust deed given to Mr. Walsh and myself, dated December 20, 1922, representing a $50,000 loan. The two notes are set forth in the trust deed, one for $8,000 and one for $42,000.

(Said trust deed was thereupon admitted in evidence and marked Plaintiffs' Exhibit 3, and is in all particulars as alleged in the complaint in case No. 198 and in the answer in case No. 208.) [48]

At the time of making that loan I had an abstract of title on the Willow Creek ranch and the land de-

(Testimony of William M. Kearney.)

scribed. I know about the indebtedness of the Farmers & Merchants Bank. There was a $30,000 indebtedness represented by a trust deed given by Mary C. Hill and Thomas Hill dated in 1917. The interest had not been paid for some time. That indebtedness of $30,000 was taken up at the time this loan was made, the transaction was carried on simultaneously. In other words, the $30,000 plus the interest, which in round numbers was $2000, was paid to the Farmers & Merchants Bank, and simultaneously therewith they reconveyed to Mary C. Hill all of the property known as the Willow Creek ranch, and specified in the trust deed. They conveyed that direct to her. This indebtedness to the Farmers & Merchants Bank of $32,000 was paid out of the $50,000. It was turned over by certified check which I had and which had passed in the transaction from Mary Hill to the Farmers & Merchants National Bank. And then the Farmers & Merchants National Bank made a reconveyance of the property in their trust deed direct to Mary C. Hill. Before the loan was concluded it had been arranged with Mrs. Lonkey by Mr. J. E. Pardee, and Cleveland Hill, and Seymour Case, that Mrs. Lonkey would release the $27,200 mortgage under a contract which was in escrow, or to be escrowed with the Lassen County Bank of Susanville, California. $10,000 was to be deposited with the Lassen County Bank of California, and upon the deposit of that $10,000 over and above the $32,000, I would be furnished with a release of the second mortgage by Mrs. Georgiana Lonkey. I deposited

(Testimony of William M. Kearney.)

the $10,000 with the Lassen County Bank, in accordance with a previous understanding and negotiation with Mr. Bridges, the cashier of that bank, who, in my presence, had called up Mr. Pardee, who was representing Mrs. Lonkey. I returned to Reno the following day, I [49] believe, and received this letter from Mr. Bridges concerning the transaction—a telegram and a letter confirming it.

(Said telegram and letter were admitted in evidence, marked Plaintiffs' Exhibit 4, and were as follows:)

PLAINTIFFS' EXHIBIT No. 4.

"Susanville, Calif., 953 A. Dec. 21, 1922.

W. M. Kearney,

Gazette Bldg., Reno, Nev.

Have in our possession release of mortgage on Hill ranch executed by Georgiana F. Lonkey. Forwarding copy by mail to-day.

BANK OF LASSEN COUNTY.

Susanville, California, December 21, 1922.

W. M. Kearney,

Gazette Building,

Reno, Nevada.

My dear Mr. Kearney:

We are inclosing a copy of a telegram sent you today. In accordance with our promise, we are inclosing a copy of the Release of Mortgage executed by Georgiana F. Lonkey, the original being held in this office subject to a deposit of $10,000.00 to be made with us.

(Testimony of William M. Kearney.)

If you will send us a check for that amount, we shall be pleased to file the Release for record and forward the same to you when returned to us by the County Recorder.

Trusting we have handled this transaction according to your wishes, we are

Very truly yours,
C. H. BRIDGES, Cashier."

The $10,000 was immediately deposited at the request of Mary C. Hill with the Bank of Lassen County, and the $27,000 mortgage was released. That makes $42,000 of the $50,000. Mr. Case, an old acquaintance of mine had come to Reno and stated that he was representing his mother-in-law, Mrs. Hill, and that the interest on the Lonkey mortgage was overdue, and there were some other pressing bills to pay, such as taxes coming on, and they needed some money immediately. The amount that he specified was $8,000. [50] I got that together. It was with the intention of getting for them the $50,000 loan as a whole. That much was advanced on the 24th or the 26th of September, 1922, I have forgotten the exact date. A note and a third mortgage were prepared and signed by Mary C. Hill, covering that $8,000. Then that was merged in the final trust deed which was given. I was advised by Mrs. Hill that there was a $2500 payment on the Lonkey mortgage; then there was interest. The money was turned over for that purpose, and on that representation, and Mrs. Hill told me what she had done with it. And Mr. Case also. Mr. Case was doing most of the business for Mrs.

(Testimony of William M. Kearney.)

Hill. $2,500 to Mrs. Lonkey. $3,300 interest to her. Then there was $1,050 paid on back interest to the Farmers & Merchants Bank. Then there was some litigation on the ranch—Mr. Williamson, of San Francisco, was representing them in a condemnation suit, where the Tule Irrigation District was condemning a right of way across the land, and Mr. Williamson was paid $500. That totals $8,050. I am just stating what they advised me as to the payments. This is a copy of a statement made by Mrs. Hill which she filed in the court at Susanville in the matter of the Estate of Thomas Hill, deceased. The indebtedness of $50,000 drew 8 per cent interest. The first installment was paid in June, 1923. The next installment was defaulted. A check for $1500 was sent to me, and the check returned unpaid. Subsequently a check of $750 was sent to take up the $1,500 check. Without the account, I would say that that is all the interest that was paid. There was no interest paid after February, 1924. It ran through 1923. It was paid up to February, 1924, and I think that was all the interest that was paid. No interest after that. They paid the taxes a portion of the time, and then we were obliged to pay the taxes. The taxes, expenses and incidentals paid out [51] amounted to $1,531.91. I have not got that segregated. The principal and interest amounted to $60,339.29 on the date of the sale under the trust deed on June 14, 1926, making a total of $61,871.20, which was the actual interest and outlay, aside from any trustees'

(Testimony of William M. Kearney.)

charges, or the provision in the trust deed of 5 per cent for default. The sum that was due on the date of the sale was $61,871.20. This is a default, recorded in the records of Lassen County, pursuant to the California statute requiring a default certificate under a trust deed. It was executed by Trustees Patrick Walsh and W. M. Kearney. It was recorded on the 18th of November, 1925.

(Said document was admitted in evidence, marked Plaintiffs' Exhibit 5, and was in accordance with the allegations of the complaint in case No. 198 and of the answer in case No. 208.)

From the second default in interest down to the time the property was actually sold, we had consistently told them that we did not want the property, that if they could sell it and get the money that is all that Mr. Walsh desired, or myself, for the $8,000 interest that I had advanced. They made a number of attempts to sell it. I tried to aid them in selling the property. The property was offered for a period of two years but without any success at all in making a sale. I think every avenue had been exhausted in attempting to make a sale of the property, or to make a new loan on the property and refund the old loan. I had probably half a dozen or more letters on the question of refunding the loan, or selling the property. This is a deed made by the trustees John M. Walsh and Thomas A. Kearney immediately following the sale of the property on June 14, 1926. The deed is dated June 21st, just about a week later. That is the trustees' deed to Patrick Walsh & Sons, Inc.

(Testimony of William M. Kearney.)

(Said deed was thereupon submitted and read in evidence, [52] marked Plaintiffs' Exhibit 6. Said deed was in accordance with the allegations of the complaint in case No. 198 and of the answer in case No. 208 and recited that in consideration of a receipt from William M. Kearney and Patrick Walsh for the sum of $61,871.20 the property was conveyed to the purchaser, Patrick Walsh & Sons, Incorporated.)

At the time I took this trust deed there was an abstract of title prepared. It was not extended, but it had been prepared showing title up to December 20th, I believe the date the trust deed is. In that abstract this deed from Thomas Hill to Mary C. Hill was contained. The deed was recorded in August, 1922. When the $8,000 advance was made, I did not have any knowledge the way that deed had been made and delivered. Subsequent to that time and at the time that the bank reconveyed the property to Mary C. Hill, it was disclosed that the deed had been given to Mary C. Hill, placed in Mr. Julian's custody and delivered in 1917, the date of the execution of the deed, and Mary Hill, from that time, claimed the property. She, herself, stated that the property was hers, and that it was intended that she should have that property, as well as her home property—the house in which she lived at Susanville. That statement was made to me at her home on the 20th of December, 1922. I visited her home the day the trust deed had been executed. It had not yet been delivered. The trust deed was executed on the 20th day of Decem-

(Testimony of William M. Kearney.)

ber, at her home, and the final conclusion of the papers took place on the 29th day of December, 1922. At the time the $50,000 was loaned there was no contention that it was not her property. Every representation was made both by Mr. Case, Cleveland Hill and by Mrs. Hill that the property was hers, and she had been dealing with it and had negotiated a right of way with two irrigation districts there, and [53] they had dealt with her in that connection, and she had given them a deed to a right of way across the property, and had accepted the money. Mr. Pardee was representing the irrigation districts and dealt with her as the owner of the property. The first information that I had of any claim being made by the estate was in a letter from Hubert Hill some time later, in which he said the Lassen County Bank, which had two notes, I believe, for about $8,000 was behind a move to question the trust deed that we held. That was after the mortgage had been made and the money advanced. That must have been in the latter part of 1923. The letter is undated, but this might fix the time. Mr. Hill had sent me a check for his mother for $1500 on account of interest. Between the time the check had been mailed and the time that it was returned to the Lassen County Bank to be paid the Lassen County Bank had apparently taken the money for themselves to pay on their $8,000 open account that they had. I think the letter states. If it does not that is what Hubert Hill told me. Up to the time he advanced the money and took

(Testimony of William M. Kearney.)

the trust deed we had no knowledge that on the part of anyone there was any such claim. We had advanced the $50,000 in actual cash, and in reliance upon the abstract showing.

Cross-examination.

I received the statement (Plaintiffs' **Exhibit 2)** shortly after its date. It is dated October 19, 1922. The $8,000 had been advanced prior to that time. From that statement I did not learn that the estate of Thomas Hill was interested in the property. This statement is separate; one page is Mary C. Hill's property and the other page is the property of the estate. I rather think that I knew that there had been no administration on the estate of Thomas Hill. I would not say positively. I was not [54] interested in that. I know there was no probate proceeding pending. I asked Mrs. Hill, on December 20th, when the trust deed was signed, concerning the delivery of the deed, and I made the inquiry there, and also learned, as I stated, that she had been dealing with the property with the irrigation districts. Up to that time that was all. Mr. Julian was not available at that time. He had left Susanville, and I did not know his address. I rather think that is as far as I went with any information as to whether the estate was interested. Mr. Case came to me in the first place probably as a friend. I had known him for some time. I had gone to college with him. He wanted to know if I could help them out in securing a loan. A Mr. Sorgi, of

(Testimony of William M. Kearney.)

Reno, was approached for it. For a time he indicated that he might lend the money. He did not have sufficient available money. Then I got in touch with Mr. Walsh for them. I don't know whether I represented the lenders or the borrowers in this transaction, or whether I represented them both. I have stated the facts. I don't know. It was just one of those things that comes up. I felt very kindly toward the Hills. Mr. Hill gave me $500, as he said, as a bonus for making the loan. Mr. Case paid it to me. I knew both parties. I don't think there was ever anything said about who I represented. Mr. Walsh did not show up until the money was turned over, except once when he examined the ranch, in October, I believe. The transaction was concluded on the 20th day of December, 1922. I appeared at Mrs. Hill's home and she signed the papers. The papers were not actually delivered, I think, until the 29th, because of defects, I have forgotten just what it was now, but they were held up for a week or ten days. Up to that time I had made no further examination as to matters affecting the title to the property, other than I have stated, inquiries from Mrs. Hill and Mr. Case [55] and Cleveland Hill. Mrs. Hill told me that that deed had been given to Mr. Julian in her presence, as Mr. Julian has already testified. At that time I did not in detail make any inquiry or investigation as to who had been in possession of and had been operating the property from the date of the deed in December, 1917, to the date of

(Testimony of William M. Kearney.)

Mr. Hill's death. I just took it for granted that Tom Hill was there. He and his wife were living on the property for some time. The reason the trust deed is executed not alone by Mary C. Hill, but by the children of Mary C. Hill was I think, primarily, when the trust deed was reconveyed by the bank, they wanted a power of attorney from the children to reconvey it to her, so the whole transaction was carried on by Mary C. Hill and Mary C. Hill as attorney-in-fact for her children.

"Q. You treated with the children, then, as heirs-at-law of Thomas Hill, did you not?

"A. That was just as a matter of precaution. The bank, when they made a reconveyance to her, wanted that.

"Q. And from your knowledge of the property, and the title to the property, you required the heirs of Thomas Hill all to sign that trust deed?

"A. They did sign it."

Redirect Examination.

Walsh and the other trustees had no notice of how this deed from Hill to his wife had been delivered. They left it to me. Nothing was said about it. Mr. Walsh did not come in until I think it was the 17th or 18th of December, 1922. He gathered up the money to make up the $42,000. The $500 that was paid to me I regarded more as just a bonus from Mr. Case, he appreciated the fact that I had helped them out of an immediate desperate situation. Mrs. Lonkey was after them for her

(Testimony of William M. Kearney.)

money, and they had no ready cash. And the Farmers & Merchants Bank's interest on the $30,000 trust deed was due; taxes were coming on. He just simply said, "We are going to give you the $500 for your efforts." [56] The $500 was to take care of some expenses I had in getting the loan. There were a number of trips made to San Francisco to get the $42,000 together. I made one trip to Austin, perhaps two trips to Austin, by automobile, perhaps some 200 miles across the desert; and also a trip or two to the ranch. Mr. Walsh went up there. I was not the regular attorney of Mr. Walsh at that time. I am not any direct relative of Mr. Walsh. My sister married Mr. Walsh's son. I cannot say that I was acting as Mr. Walsh's attorney generally at that time. I think Mr. Ernest K. Brown, of San Francisco, had done some business for him. [57]

TESTIMONY OF HUBERT W. HILL, FOR DEFENDANTS.

I reside at Susanville, California. I am a son of Thomas Hill, deceased. At the time of my father's death I was engaged in stock raising and a retail meat market. I had charge of the retail meat market in Susanville. My father operated other property besides that. Besides this ranch known as the old Folsom Ranch, he had the ranch known as the old Lonkey Ranch. The ranch I speak of is known as the Willow Creek Ranch,

(Testimony of Hubert W. Hill.)

known as the Home Ranch. I am familiar with the property described in a certain deed made by my father to my mother. That is known as the old Folsom Ranch or the Willow Creek Ranch. At the time he died he was in charge of it. He had my brother, Gay Hill, operating it. Gay Hill was on the Willow Creek Ranch. I know about the delivery of the deed to my mother by Mr. Julian in his office in Susanville. I was present in the office at that time. My brother, Cleve Hill, went with me to Mr. Julian's office. Cleveland Hill is now deceased. We went in and asked him if he had this deed that we heard was made. We asked Mr. Julian, and he said "Yes," and he took it from his safe and handed it to us, handed it to Cleveland Hill. First we took it home and gave it to mother and talked it over. We thought we had better have it recorded at once. By somebody's advice, we were asked to put on the stamps before it was recorded, there were not any stamps on it at the time it was turned over to us. I gave my brother a check for $100, and he was to go to the postoffice and buy the proper amount of stamps and put them on, and then record the deed. That was the day following the day Mr. Julian gave the deed to us. I am acquainted with Mr. Kearney. The first time I saw Mr. Kearney was in front of the Hotel Golden, in Reno. That was on the occasion when we [58] went to Reno to negotiate for a loan. We had a man by the name of Mr. Sorgi in mind when we left for Reno. My

(Testimony of Hubert W. Hill.)

brother, Cleveland, Seymour Case, and myself went to Reno and met Mr. Kearney. We told him what we were down there after. To my recollection he said he thought he knew a man, and mentioned Mr. Walsh, that would likely make the loan for us. We talked further with him about the condition of the property. After we thought we could get some money from him, we went up to his office. That was after we talked to him. We told him everything we knew about it with regard to the trust deed that father left to mother. We also told him there were no outstanding obligations. In fact, we told him everything that we knew about it. There was something said at that time about probating my father's estate. At that time we talked it over, and Mr. Kearney said he did not think, it was not advice or anything, it was just what he said, he did not think it would be necessary for us to probate it at that time. On that advice we went home immediately afterward and went to see all the creditors that I knew, and asked them not to force us into probate right away. I did that immediately on returning to Susanville. At that time I did not consult any other counsel with reference to the probating of the estate. I did later. At that time that we had the conversation with Mr. Kearney about this loan we knew that there were outstanding claims against our father. They were talked about at the same time. They were all unsecured claims. Those are the people that I notified. At the time when we went to Reno there were only

(Testimony of Hubert W. Hill.)

two secured claims. Those were the claims of the Farmers & Merchants National Bank and Mrs. Lonkey. I know about the disposition of the proceeds of that loan from the trust deed. The $2500 that Mr. Kearney mentioned [59] as being an item paid to Mrs. Lonkey was for part payment on what is known as the Lonkey Ranch, that had become due, the contract price of the ranch. That was a separate ranch from the ranch described in the deed. The item of $3300 for interest paid to Mrs. Lonkey was for interest, at the time, on the contract price of the ranch, plus interest on a note secured by a second mortgage on the Willow Creek ranch, on the purchase price of cattle. It was interest on the Lonkey Ranch, which was separate from the Willow Creek Ranch; also interest on the Willow Creek Ranch, a second mortgage which she had, to help secure the purchase of cattle. I know about the $10,000 deposited in the Bank of Lassen. That was used almost entirely to bring the contract of Mrs. Lonkey to date and to buy additional cattle, so that she would have additional security and release the second mortgage held on the Willow Creek Ranch. The cattle that were purchased with the $10,000 then became subject to the mortgage which Mrs. Lonkey had, the chattel mortgage. The $10,000 was not paid directly to Mrs. Lonkey. It was not, except as just stated; it was not paid on any mortgage. The contract that I spoke about on the Lonkey Ranch is a contract for the purpose of the Lonkey Ranch that my father held when he died.

(Testimony of Hubert W. Hill.)

It was finally abandoned and taken over by a man by the name of Jenkins. The Hill heirs, or the Hill Estate did not complete it. It was taken over by a man by the name of Jenkins. The Hill estate did not get a thing out of it.

Cross-examination.

I went to Mr. Julian's office at the instance of George McDow. He was the one that informed us that this trust deed was in existence. I don't mean the trust deed, I mean the deed from my father to my mother. If my mother knew about this deed she had forgotten about it because at that time we did not know of its [60] existence, and it was George McDow who said this was in existence, and we began looking for it. We also took a trip to Reno, to the Farmers & Merchants National Bank where my father had a safe deposit box. We went there to look for the deed before we went to Julian's office. McDow told us that such a deed was in existence. I believe he drew it up. Out of this $50,000 which was borrowed on the trust deed $30,000 on the principal and $1,212 niterest went to the Farmers & Merchants Bank to pay their mortgage. The balance, $500, went to Kearney, and other incidentals used up the $32,000. The taxes were not paid out of the $32,000, but out of the $8,000 that I got from Mr. Kearney, I believe no taxes were paid; according to my recollection at the present time no taxes were paid.

(Testimony of Hubert W. Hill.)

"Q. What was done with the first $8,000 you got from Mr. Kearney?

"A. At that time there was an irrigation project going through, and we wanted to get that contract to date, so that we could file an injunction against them and make them pay for the right of way through there.

"Q. You did not expend $8,000 on that, did you?

"A. A good portion of it. There was $2500 on the contract purchase price, and $3200 interest due. I don't remember the exact amounts."

The $10,000 paid to Mrs. Lonkey was so we would buy more cattle and bring the cattle up to a certain number. In consideration of giving her more cattle she released the real estate from the mortgage. We paid her no money on the mortgage, we gave more cattle. That was in consideration of the payment of part of the $10,000. It was left in escrow until the cattle were bought. It was not all used for the purchasing of cattle.

Redirect Examination.

Out of that same money that the interest and principal were paid to Mrs. Lonkey, there was a payment made to Mr. Pon for a mortgage that he held against a parcel of land known as the Hill Land & Livestock Company. He had started foreclosure proceedings, and we paid him off. It was $1200 and something. Out of that money [61] the Lassen County Bank was paid interest on notes. All interest on notes was brought up to date. The

(Testimony of Thomas Gay Hill.)
land of the Hill Land & Livestock Company was not part of the Hill estate. It was an incorporation. [62]

TESTIMONY OF THOMAS GAY HILL, FOR DEFENDANTS.

I reside at Standish, Lassen County, California, and am a son of Thomas Hill, deceased. At the time my father died, in July, 1922, I resided in Willow Creek. I am familiar with what is known as the Willow Creek Ranch. I resided on that ranch at that time, and had for about 16 years. My father resided in Susanville part of the time, and part of the time on the ranch. My father had active charge and was conducting the Willow Creek ranch, just prior to his death. I was carrying on the business of the ranch under my father's instructions and had been practically all of those 16 years. There was no difference in the manner in which the ranch was conducted and my instructions were received during the period to December, 1917, and after December, 1917. On occasions I sold the produce of the ranch, and turned the proceeds over to my father. That is true during all the time up to the time my father died. I do not know anything about my mother making any claim to be the owner of the ranch between the 15th of December, 1917, and the date my father died. [63]

TESTIMONY OF J. E. PARDEE, FOR DEFENDANTS.

J. E. PARDEE, witness for defendants, testified: The indebtedness of the estate of Thomas Hill, deceased, was in the neighborhood of $17,000; I think it is $16,820 besides interest. The assets are 320 acres of land at $15 an acre, or $4,800. Then there is a judgment in replevin for $2,840. Then the stock was sold for $8,460. There were 14,000 shares of this stock, of which 10,500 belonged to the estate of Hill. We have realized no money on it and there is no prospect of realizing any money on it. The butcher business was carried on by Mrs. Hill for a year or so after Hill's death. My impression is that it was a losing proposition. We have not been able to realize anything on the fittings in the shop. The business had to be abandoned. The loss was a good deal more than $6,000. We have not done anything toward recovering that from the administratrix's bond or anything of that kind. There is a bond. There was a slaughter house on the land that belonged to the Hill Land & Cattle Company that is covered by this stock organization that we have mentioned. That never has been disposed of. I don't know what that building is worth. I think before administration was started, the boys negotiated for the purchase of another slaughter-house near town. It was acquired and paid for. We sold that under administrator's sale, and the proceeds have been applied

(Testimony of J. E. Pardee.)

to the payment of expenses of administration. The papers that are shown me are signed by Thomas Hill. Those are his signatures.

(Said papers were thereupon admitted and read in evidence, marked Defendants' Exhibit "A," and are as follows:)

DEFENDANTS' EXHIBIT "A."

"INDIVIDUAL OR PARTNERSHIP STATEMENT.

To the Bank of Lassen County.

For the purpose of obtaining credit with you from time to time, I herewith submit the following as being a fair and accurate [64] statement of my financial condition on Apl. 21st 1919:

Assets:

Cash on hand and in bank		500
Notes receivable (state security if any)		700
Accounts receivable		120
Stocks and bonds (list on reverse side)		1600
Live Stock:		
Horses	50	7500
Cattle	100	6500
Sheep	30	300
Hogs		250
Salable merchandise		1000
Total Quick Assets		18,740
Real estate (list on reverse side)		245,000
Machinery and tools (actual value)		11,760
Total		$275,230

Liabilities:

Notes payable, to banks	2650
Other notes payable	0
Open accounts payable	600
Total Current Debts	5250
Mortgages or liens on real estate	30000
Chattel mortgage	0
Other indebtedness	0
Total Liabilities	35,250
Net Worth	$239,980
Total	275,230

Liability as endorser for others: $ No.

Are any of above assets pledged to secure indebtedness? As shown.

Life Insurance carried: $ None payable to ———.

Fire Insurance on personal property: $8100.00.

Do you carry Employers Liability Insurance? Yes.

(Over) Signed THOMAS HILL.

STATEMENT OF THOMAS HILL.

Location Lassen County: 3500 acres.

In whose name is title held? Thomas Hill.

Value of land and improvements: $245,000.

Amount of mortgages or liens: $30,000.00.

Description of stocks and bonds: Liberty Bonds & Lassen Grain & Mllg. Co. Stock." [65]

"INDIVIDUAL OR PARTNERSHIP STATEMENT OF THOMAS HILL, SUSANVILLE, CALIF.

To Bank of Lassen County, Susanville, California.

For the purpose of obtaining credit with you from time to time, I herewith submit the following as being a fair and accurate statement of my financial condition on June 19, 1922:

Assets:

Cash on hand and in bank		30
Notes receivable (state security if any)		—
Accounts receivable		500
Stocks and bonds (list on reverse side)		1150
Live Stock:		
Horses	80	10000
Cattle	800	36000
Sheep	—	
Hogs	50	500
Salable merchandise		500
Total Quick Assets		48680
Real estate (list on reverse side)		249000
Machinery and tools (actual value)		10000
Other assets		
Hill's Meat Market		10000
Interest in Hart ranch		7000
Total		364680

Liabilities:

Notes payable to banks	10350
Other notes payable	——
Open accounts payable	2000
Total Current Debts	12350
Mortgages or liens on real estate	30000
Chattel mortgages—Cattle	26000
Other indebtedness	——
Total Liabilities	68350
Net Worth	296330
Total	364690

Liability as endorser for others: $ No.

Are any of above assets pledged to secure indebtedness? As shown.

Life Insurance carried: $ None.

Fire Insurance on personal property: —— on real estate $8000.00.

Do you carry Employers Liability Insurance? No.

(Over) Signed THOMAS HILL. [66]

STATEMENT OF THOMAS HILL.

Description of Real Estate:

Location: Lassen County, 3500 acres. In whose name is title held: Thomas Hill.

Value of land and improvements: 245,000.

Amount of mortgages or liens: 30,000.

(Testimony of J. E. Pardee.)

Location: Lassen County. Equity in 5300 acres.
In whose name is title held: Mrs. C. Lonkey.
Value of Land and Improvements: 4000.
Description of stocks and bonds: Liberty Bond & Lassen Grain & Milling Co. stock."

Cross-examination.

I cannot tell what became of the difference in the property described in the chattel mortgage and what I sued for in replevin. Included in the chattel mortgage you say are stallions and horses. Before adverse possession was taken of that ranch, and perhaps after adverse possession was taken under the claim of the purchaser at the trustee's sale, Mrs. Hill, through her agents, had removed a considerable portion of the personal property there, and we have disposed of it as being the property of the estate of Thomas Hill, and the moneys have all been or will be in the final accounting accounted for as estate assets. What we sued for was simply articles of personal property that still remained on the ranch after our agents had moved away and after Mr. Patrick Walsh, Jr., had been put on there by somebody as representing the Walsh interests. I don't know what became of the difference in the property there. I think Gay Hill might tell you very clearly what became of it. [67]

TESTIMONY OF WILLIAM M. KEARNEY, FOR PLAINTIFFS (RECALLED IN REBUTTAL.)

WILLIAM M. KEARNEY, recalled for plaintiffs in rebuttal.

Prior to the time that I loaned the $50,000 and took the deed of trust, I did not have any conversation with Hubert Hill relative to that property. He arrived at my office with his two brothers in December, the 16th, 17th or 18th, but no conversation was had with him about the loan, or anything about it. He was talking with Mr. Walsh about the operation of the ranch. I never had any conversation with Hubert Hill prior to the time the loan was made about the manner of delivering the deed or anything at all about it. The property was bid in for $61,700. That did not include any of the trustee's expenses, or fees under the trust deed, which they lumped at $5000. The trust deed provides for a specified fee and for incidentals. The entire amount of the deficiency was fixed by the trustees at $5000.

(It was stipulated that plaintiff filed its articles of incorporation with the Secretary of State and with the County Clerk of Lassen County, and that it was a Nevada corporation, and that it had complied with the law of California about filing the articles of incorporation, and that diverse citizenship exists.) [68]

DEPOSITION OF GROVER C. JULIAN, FOR PLAINTIFFS.

Testimony of GROVER C. JULIAN, taken by deposition February 6, 1929, on behalf of plaintiffs.

I have already given my testimony in one of these cases before the Court. Prior to the time that I finally handed the deed over to Mrs. Hill I did not know anything about the financial statements made by Mr. Hill in regard to his property and which he gave to the Bank of Lassen County. I first learned of the existence of such statements made by Mr. Hill at the time of the trial of this action in San Francisco in the United States court last summer. [69]

DEPOSITION OF MARY C. HILL, FOR PLAINTIFFS.

Testimony of MARY C. HILL, taken by deposition by plaintiffs on February 6, 1929, and introduced in evidence by defendants.

I remember Mr. Kearney and Mr. Walsh loaning me $50,000. Before the money was loaned I had no talk with Mr. Kearney about the matter. Mr. Case and my son did all that. They were doing all my business for me. They were acting for me. I was at home in Susanville when they went to Reno. I don't remember the letter to Mr. Kearney (Plaintiffs' Exhibit 2), but I sure put my name down, but I didn't write that letter. I signed it and suppose I ought to know what it is, but I didn't write

(Deposition of Mary C. Hill.)

it. It was written either by my son that is dead or Mr. Case. I have read it and noticed it stated that this Willow Creek Ranch was owned by me. I thought it was. At that time I did honestly believe it belonged to me, after Mr. Hill passed away. I know that part of the money that I got from Mr. Kearney and Mr. Walsh went to pay off the mortgage to the Farmers and Merchants' Bank. I am not sure about some of it being used to pay off the mortgage to Mrs. Lonkey. I wouldn't say. The way we paid Mrs. Lonkey, you know Jenkins bought the place. We may have paid her some. I think there must have been some money left of the $50,000 after paying the amount that was paid on the two mortgages, either for principal or interest and the taxes that were on the property. I don't know how much was left over, because Mr. Case and my son were doing the business and I let them go ahead and do it and I can't remember anything about that. My husband in his lifetime was accustomed to bank at the Bank of Lassen County. I never had an account there, but my husband did. I don't think I had anything to do with the two statements that were made by Mr. Hill to the Bank of Lassen County. I do not remember ever seeing them. I never [70] have gone with Mr. Hill to the Bank of Lassen County at any time. Since this litigation has arisen, I have never seen those statements.

"Q. You say that when you borrowed this money from Mr. Kearney and Mr. Walsh, you thought that

(Deposition of Mary C. Hill.)

you owned that property, and I will ask you why did you think you owned the property?

"A. I always thought when the husband died the property went to the wife. That is the way I supposed I owned it. Of course, I knew there was indebtedness on it and I intended to pay that whenever I could, but otherwise I supposed it belonged to me."

I have heard what is referred to as the estate of a deceased person. I knew that Mr. Hill left some estate; some property of his own. It was all in his name. I did notice in this letter I stated very carefully that certain of the property was in my name and some other property was in the name of his estate.

"You knew, didn't you, that the property known as the Willow Creek Ranch was in a different position as to its title than the other property that Mr. Hill had owned, didn' you?

"A. Maybe I don't quite understand that.

"(Question read.)

"A. No, I don't think I did.

"Q. I just want to read this part of the letter to you again, Mrs. Hill, to refresh your memory. (Reading:) 'After considering your letter relative to the matter of a loan from Mr. Walsh, will advise that we are still desirous of making the loan, but don't believe we should offer as permanent security any property or equity that are part of Mr. Hill's estate. There would then remain the Willow Creek Ranch with machinery, horses and all personal

(Deposition of Mary C. Hill.)

property connected with it.' By that you mean you couldn't give security that belonged to Mr. Hill's estate, but could give the Willow Creek Ranch?

"A. That never entered my head. I never noticed that at all. I don't think there is anything to that.

"Q. Do you remember, Mrs. Hill, seeing a deed from your husband to yourself of the Willow Creek Ranch?

"A. I know I made such a deed, but I never read it and it never was read to me. He told me he was going to make it, but I didn't read it. (See correction, p. 9, line 21.)

"Q. When did you see it?

"A. I think it was in Julian's office.

"Q. Who was at Mr. Julian's office when you saw it?

"A. I don't think it was—where is Gay? Gay would know.

"By Mr. PARDEE.—You answer from your own knowledge.

"By the WITNESS.—All right then. My son and Mr. Hill and myself and Mr. Julian.

"By Mr. TREADWELL.—Do you remember about when that was?

"A. No, I don't remember the exact date because I didn't keep it in memory. [71]

"Q. It was about how long before your husband's death?

"A. That was in nineteen hundred and fifteen, wasn't it, Mr. Pardee?

(Deposition of Mary C. Hill.)

"By Mr. PARDEE.—It was in nineteen seventeen.

"By the WITNESS.—He died in twenty-two.

"By Mr. TREADWELL.—It was several years before he died?

"A. Yes. I can't remember the dates and things because I didn't impress it on my memory.

"Do you know who drew that deed?

"A. Well, Mr. Julian did.

"Q. Where did you come from before you went to Mr. Julian's office?

"A. From over home here in Susanville.

"Q. Do you remember whether he had the deed at the home before you came over?

"A. I think it was in Mr. Julian's office.

"Q. You said he told you he was going to make the deed to you?

"A. Yes, that was over home here.

"Q. Just before you went to Mr. Julian's office?

"A. Yes, sir.

"Q. What did he say?

"A. He said he was going to make a deed. When he passed away, that he wouldn't have any trouble probating and when he had passed away that he wouldn't have any trouble. That was his intentions. (See correction, page 11, line 6.

"Q. Was there more than one deed at that time?

"A. Not that I know of, concerning the ranch.

"Q. Concerning that ranch or other property?

"A. No. Not any more that I ever heard of.

(Deposition of Mary C. Hill.)

"Q. Did he say anything about giving you the home property?

"A. No. He just said he was going to make the deed to me.

"Q. The home property or Willow Creek Ranch?

"A. That was afterwards.

"By Mr. PARDEE.—I think I have the deed here. She may be mistaken. We might as well get it right.

"By Mr. TREADWELL.—You have a little home property here in Susanville?

"A. Yes, sir. That is my homestead. You are not going to touch that.

"Q. Not even the bank.

"A. No, they can't touch it.

"Q. Mrs. Hill, irrespective of when it was, whether it was at the same time he made a deed to you of the Willow Creek Ranch, you remember he told you he was also going to make a deed to you of the home?

"A. No, that was after that when he said that about the home. You mean the home over here?

"Q. Yes.

"A. No, there was nothing said about that. That was my homestead and I didn't worry about that.

"Q. Do you remember whether it was before or after the deed to the Willow Creek Ranch he made the deed to the home place?

"By Mr. PARDEE.—I think in fairness to the witness it is well enough to tell her the two deeds

(Deposition of Mary C. Hill.)

appear to have been [72] *been* executed and acknowledged both on the same day.

"By Mr. TREADWELL.—I want to get her evidence on that.

"By Mr. PARDEE.—Her memory is quite faulty.

"By Mr. TREADWELL.—As a matter of fact I don't care much about the date. Do you remember at some time he told you he would deed you the home place? A. Yes, sir.

"Q. Do you remember when he drew the deed or who drew it to the home place?

"Didn't you, Mr. Pardee?

"By Mr. PARDEE.—No. I wasn't acting as his attorney at that time and I never drew it.

"By the WITNESS.—I can't say that.

"By Mr. TREADWELL.—Now, do you remember whether before going to Mr. Julian's office you went to Miss Lowe's office—the Notary?

"A. No, I don't think we went there that day.

"Q. You know Miss Lowe? A. Yes, sir.

"Q. You don't remember going there?

"A. No, I don't remember going there at all.

"Q The only place you remember going was to Mr. Julian's office? A. That is all.

"Q. Now, you had known Mr. Julian before that time? A. Yes, I met him.

"Q. Had he done any legal work for you or your husband?

"A. Not for me, but I couldn't say—He was Mr. Hill's lawyer then and I couldn't say what the transaction was.

(Deposition of Mary C. Hill.)

"Q. When you went down there you knew Mr. Hill was going to convey the Willow Creek ranch to you? A. Yes, sir.

"Q. When you went to Mr. Julian's office what was said and what was done? (See correction, page 13, line 16.)

"A. That was a long time ago. I don't know what was said now, but I guess the deed was already and I put my signature on it. I must have.

"Q. Didn't Mr. Hill tell Mr. Julian he wanted to deed this property to you?

"A. He surely must have or he wouldn't have made the deed. He must *knew* what he was doing.

"Q. When you got through were the deeds left there?

"A. I thought it was left at Julian's office but I don't know. I wouldn't say. I don't want to say something I don't know.

"Q. After Mr. Hill's death you sent to Mr. Julian's office to get the deed?

"A. Not right away. It was a long time before we could find it. We didn't know where it was. We went to Reno. Mr. Case can tell that. And we went to Curler's and went to the Lassen County Bank and McDow's and couldn't find it and my son met Mr. Julian on the street and asked him if he had any papers belonging to his father and he said there was papers in the safe and went up and found the deed.

"By Mr. PARDEE.—It is hearsay, but we don't object.

(Deposition of Mary C. Hill.)

"By Mr. TREADWELL.—Q. You got both the deed for the Willow Creek Ranch and the deed for the home place in Mr. Julian's office at that time?

"A. I don't remember that. I know we got the Willow Creek deed. [73]

"Q. You didn't really go yourself to Mr. Julian's office to get the deed? A. No, sir.

"Q. You sent Mr. Case?

"A. It was Hubert.

"Q. Your other son.

"A. My other son.

"Q. How long had you been married, *Mr.* Hill, to Mr. Hill at the time of this transaction?

"A. How long had we been married?

"Q. Yes.

"A. We were married in eighty-one. I was going to say eighty-two, but I don't think that is right. Eighty-one. My memory is pretty bad.

"Q. I have seen worse. At that time Mr. Hill had a large amount of property other than the ranch itself? A. When we were married?

"No. In nineteen seventeen.

"A. Well, I don't know. I don't know as he did. He had property over in Long Valley.

"By Mr. PARDEE.—In this county?

"By the WITNESS.—Yes, sir. But I don't think that ever amounted to anything. Just sheep range and he sold his sheep and let the range go.

"By Mr. TREADWELL.—He had cattle didn't he?

(Deposition of Mary C. Hill.)

"A. Yes, he had some cattle on the ranch. The Lonkey cattle. You read in that letter.

"By Mr. PARDEE.—I think Mr. Treadwell's question referred to nineteen seventeen didn't it?

"By Mr. TREADWELL.—Yes. Back in seventeen. At that time he had lots of cattle, didn't he?

"Not so very many. Some. I don't know how many. I couldn't say.

"Q. He had this market here in Susanville, didn't he?

"A. The market here wasn't very good.

"By Mr. PARDEE.—Was the Hill's meat market running in nineteen hundred and seventeen?

"A. I didn't refer to that. He sold to butchers that would come in and buy cattle from him.

"Q. Did he have a store or meat shop?

"A. I don't think he did then.

"By Mr. TREADWELL.—What did he have?

"A. You will have to call on somebody else as to when he opened the meat market.

"Q. Did he have as much property in nineteen seventeen as he did in nineteen?

"A. I suppose he did. I don't know of any that was disposed of. Just a few cattle, maybe, or something lke that.

"Q. Did he give any other reason why he wanted to deed this property to you, any reason other than the fact that it would save any probate trouble?

"A. I never heard him say. That is the only reason he ever gave me.

(Deposition of Mary C. Hill.)

"Q. Did he say he was going down to Mr. Julian's office to have him fix it up?

"A. I presume he did say that. I know he told me to get in the car, I guess, and come over now.

"Q. Now, after that time you continued, of course, to live with Mr. Hill up to the time of his death?

"A. Yes, sir. [74]

"Q. And did he ever say anything more about the fact that he had deeded the property to you?

"A. I never heard it mentioned after that. Never heard anything more about it.

"Q. Do you remember after Mr. Hill's death, your selling a right of way over the Willow Creek property to the Irrigation District?

"A. Yes, I remember that. He started that himself but he passed away. We had to get it through because they were going to force it.

"Q. They were going to condemn?

"A. They were going to, yes, sir.

"Q. You made a deed right away?

"A. Yes, sir. Mr. Williamson from the city, we got him to do the transaction. They would go through anyway.

"Q. You signed the deed and got the money?

"A. I surely must have.

"Q. Do you remember how long that was after Mr. Hill's death that you did that?

"A. It took a little time to get things straightened out, but I can't recall how long it was. It wasn't so terribly long."

(Deposition of Mary C. Hill.)

(It was thereupon stipulated that the agreement entered into with the Tule Irrigation District and Baxter Creek Irrigation District with Mary C. Hill for the rights of way was dated December 23, 1922, and acknowledged on that date. That was after Mr. Hill's death. It was just signed Mary C. Hill individually.)

Cross-examination.

"By Mr. RANKIN.—How old are you, Mrs. Hill? A. Sixty-eight.

"By Mr. PARDEE.—What year were you born?

"A. June.

"Q. What year?

"A. I don't know, I will have to figure it up.

"By Mr. RANKIN.—Your answer is sixty-eight now?

"A. Yes, sir.

"Q. Well now, Mrs. Hill, I understand you to say—

"A. Excuse me. Eighteen hundred and fifty-nine was when I was born. June, fifty-nine.

"Q. I understood you to say that you remember going to Mr. Julian's office. Now at the time that you were looking for this deed after Mr. Hill died, do you remember that then or did it slip your mind?

"A. I hadn't the slightest idea where the deed was because he never told me and I never knew *aht* become of the deed. I begin to think there was no deed. Mr. Julian wasn't Mr. Hill's [75] lawyer when he died. He had Curler and I never thought of going there. That is why I didn't go to

(Deposition of Mary C. Hill.)

Julian's in the first place and Hubert met him on the street and asked him if there were any papers there and he said yes and we went up there and found it. If we had knew we couldn't have went to Reno looking for it.

"Q. Who was your legal adviser if you had one at the time that you made the deed of the right of way to the water company? A. Mr. Williamson.

"Q. W. F. Williamson of San Francisco?

"A. Yes, sir.

"By Mr. TREADWELL.—How much money did you get from the Irrigation District?

"A. I can't recall that. It wasn't very much.

"Q. About how much?

"A. Have you any idea, Jessie?

"By Mr. BARRY.—How much was it, Mr. Pardee?

"By Mr. PARDEE.—One thousand dollars according to the statement. (See correction, page 19, line 19.)

"By Mr. TREADWELL.—Do you remember when Mr. Kearney and Mr. Walsh took possession of the Willow Creek Ranch? You remember the occasion? I don't care about the dates?

"A. Yes, sir. They put it up for sale and there was no one there but myself, but I don't remember the exact date.

"Q. Did you tell them to take possession of the property? A. I couldn't help myself.

"Q. They came and saw you first?

(Deposition of Mary C. Hill.)

"A. I don't believe they did. I will tell you if you will let me talk. I am going to tell you a few things. When he put the ranch up for sale—

"By Mr. PARDEE.—I don't think that is material.

"By Mr. TREADWELL.—Didn't Mr. Kearney come to you and tell you he was going to take possession of the ranch?

"A. He never come near me."

(Upon signing this deposition the witness made the following corrections:)

"Page 9, line 21.

"A. I didn't make the deed, but he did. I know that. I know he made the deed, but I didn't read it. I signed it. No, I didn't sign it. That wasn't the paper I signed that day. He told me he was going to make it but I didn't read it.

"Page 11, line 6.

"A. It must be he meant that I wouldn't have any trouble but I don't remember. There must be a mistake there some way. That I wouldn't have any trouble. Wouldn't have to probate when he passed away. That is what he meant by it. That is what he said. He said that if I passed away first it would be his. Go to him. That is as near as I can remember the talk.

"Line 16, page 13.

"Q. When you went to Mr. Julian's office what was said and what was done?

(Deposition of Mary C. Hill.)

"A. It is a long time ago and I don't recall what was said and done that day. I thought Mr. Julian made the deed, but I guess he didn't. [76]

"By Mr. ROBINSON.—Q. Do you know who did make the deed?

"A. I was told George McDow did.

"Page 11, line 6.

"Q. Now, Mrs. Hill, just before you went to Julian's office you had a conversation with your husband. I am referring to the time you went there to execute the deed.

"A. I didn't know anything about having the deed made until that very day.

"By Mr. ROBINSON.—Q. Did you have a conversation with him before you went to the office?

"A. I guess we talked it over but I can't recall what was said only he was having a deed made and wanted me to go to the office. I can't recall anything else.

"Q. What did he say as to the purpose of the deed?

"A. It is down there that he wanted to get it so if he passed away I wouldn't have any trouble and if I passed away first he wouldn't have any trouble. That is as near as I can recall the conversation.

"Q. You understand if a deed were given to you the property would be yours?

"By Mr. RANKIN.—Object to that as leading and calling for a conclusion.

"By the WITNESS.—Why, yes.

(Deposition of Mary C. Hill.)

"By Mr. ROBINSON.—Q. Did he ever discuss giving you that property before?

"A. No, not until that day.

"Q. He did state about making a deed to you at that time? A. That day?

"Q. Yes.

"A. Yes, he told me that. That is what I went over for but there was other papers made out that day.

"Q. You went over for the purpose of getting that deed did you?

"A. I can't say that, I guess I went over just as much for the other papers too.

"Q. One of your purposes in going over was to get the deed? A. I suppose so.

"Page 19, line 19.

"A. I wasn't there and never went near them.

"Q. Do you remember the occasion when they did take the possession of the Willow Creek Ranch? You remember the fact they did take the ranch?

"A. Yes, sir.

"Q. Were you at the sale? A. No, sir.

"Q. Did you tell them to take possession of the property?

"A. No. I didn't see them to tell them anything. They never come near me.

"By Mr. ROBINSON.—Q. Did you write to them, Mrs. Hill? A. No.

"Q. Did you tell anyone else to tell them?

"A. No, I had nothing to do with that.

(Deposition of Mary C. Hill.)

"Q. Have you discussed this matter, the deposition, with either Mr. Rankin or Mr. Pardee? Have you gone over these questions with either of them?

"By Mr. RANKIN.—Object on the ground it is improper. No notice of a second deposition and that there is no authority for re-examination of the witness. It is immaterial and incompetent.

"By Mr. ROBINSON.—Have you discussed this deposition with either Mr. Rankin or Mr. Pardee?

"A. They read it over to me.

"Q. When was that? A. To-day.

"Q. This morning? A. Yes, sir.

"Q. At what place? A. Right here.

"Q. At your house? A. Yes, sir.

"Q. Did you discuss the answers to any of the questions?

"A. We talked over where there was mistakes.

"Q. Did you find those mistakes?

"A. Certainly we did.

"Q. Did you find the mistakes?

"A. When they read it to me I could see where mistakes were.

"Q. And you pointed those out? A. Yes, sir.

"Q. The corrections you made this afternoon were in regard to the mistakes you found this morning? A. Just the same." [77]

DEPOSITION OF SEYMOUR CASE, FOR PLAINTIFFS.

Testimony of SEYMOUR CASE, taken by plaintiffs on February 6, 1929.

My name is Seymour Case. I had something to do with the negotiations of this loan by Mr. Kearney and Mr. Walsh to Mrs. Hill. I am Mrs. Hill's son-in-law. I wrote the letter dated October 19, 1922 (Plaintiff's Exhibit 2). I probably discussed it with those other parties before I sent it. I don't remember the time of doing it, but I probably did. I can testify as to the distinction we made between the property in the Hill estate and the Willow Creek ranch. We based that distinction on the belief that the Willow Creek ranch was Mrs. Hill's own individual property, I presume. I knew of this deed that was made by Mr. Hill to Mrs. Hill in nineteen hundred and seventeen at that time. I knew who got it from Mr. Julian and where it came from. I, of course, honestly believed that property was hers at that time. I knew that Mr. Kearney was expecting to get a valid mortgage lien on that property. I discussed with Mr. Kearney the proposition of getting the $50,000. I think the particular necessity at that time was on account of the money due Mrs. Lonkey for interest or something that was pressing, being the first immediate consideration. Later the larger loan was to take up the trust deed of the Farmers' and Merchants' Bank on which there was interest overdue. The

(Deposition of Seymour Case.)

principal and interest were overdue. The first eight thousand dollars was used largely to take care of the interest or something else on the Lonkey loan, and the second or larger amount was used largely to take up the loans of the Farmers' and Merchants' Bank. There was little money left over from the amount that was paid to get the Lonkey release and the amounts paid to get the release of the Farmers' and Merchants' Bank and pay the taxes on the property. I think a small amount. I don't remember what it was. [78] I do not recall ever having any talk with Mr. Hill about having deeded this property to his wife. At the time that I obtained the loan from Mr. Kearney and Mr. Walsh, and at the time I wrote that letter, I don't think I knew anything about these financial statements that Mr. Hill is said to have made to the Bank of Lassen County. I do not remember ever seeing them, although I may have seen them at the bank, but I don't recall having seen the financial statement. We prepared a statement of resources. I think that was made independent of any statement Mr. Hill made. I am referring now to the statement that we made to Mr. Kearney in nineteen twenty-two. Before the negotiations were started at all with Mr. Kearney and Mr. Walsh, we went to the Bank of Lassen County, Mrs. Hill's sons and myself, shortly after Mr. Hill's death, and talked with Mr. Bridges about the best plan to follow and discuss the chain of affairs. We spent some time in there discussing

(Deposition of Seymour Case.)

what we desired to try to do. That was to get a loan. Mr. Bridges was cashier of Bank of Lassen County. As the transaction was being consummated there had to be certain transactions carried through in order to get the release of the Lonkey mortgage. I don't recall exactly where the papers were held, but it seems to me the money had to be turned in and went through the Bank of Lassen County and deposited there before the papers were released. I don't recall the details of how that was carried through, but the money was deposited as we got it two different times with the bank and I presume Mr. Bridges had the papers. Mr. Bridges knew this money was coming from Mr. Kearney and Mr. Walsh, and they knew that Mrs. Hill was borrowing it. At that time there hadn't been any administration at all on Mr. Hill's estate. At the time of Mr. Hill's death he had considerable property other than the Willow Creek Ranch; quite a large amount of cattle at the time he had what we call the Lonkey cattle, a considerable number. I think [79] he had some cattle beside the cattle that were under the Lonkey mortgage. Not a great many, I don't suppose. He had a shop, Hill's Meat Market, and a slaughter-house, and then he had an interest in the Hart ranch. That was a corporation in which he had stock. After his death there was a big slump in the cattle business and the value of cattle and value of cattle land. I think about that time or maybe before his death. They were low during those years and immediately follow-

(Deposition of Seymour Case.)

ing his death. I am not in the stock business myself and wasn't at that time and didn't follow that closely. I don't know whether there was a slump in 1919, 1922, or 1924. I remember the sale of the Willow Creek property by Mr. Kearney or Mr. Walsh. I don't remember how much we tried to get a Federal loan on the property. We discussed it. We didn't go to the Farm Loan Bank in person. We may have written, but I don't recall. I don't recall that we went to Mr. Fleming; we might have, and probably discussed the probability of getting a loan from him. I had no authority to sell the property. I believe I suggested it to Mr. Fleming if he was interested in buying it, but I had no authority from Mrs. Hill or the estate to sell it. I never got any offer for the property myself. I don't recall particularly that Mr. Hill gave an opportunity to the Hill people to sell the property. I might have discussed it with the boys. I know what I thought the property was worth at that time, when I was making these negotiations. I know Mr. Kearney and Mr. Walsh at any time were willing to step out of the picture if they got their money back. The only talk I particularly remember with Mr. Bridges was when I and several of her sons were there and was shortly after Mr. Hill's death, and I don't recall whether or not the deed had been found at that time.

"Q. Do you remember whether you talked to Mr. Bridges about the fact Mrs. Hill owned this particular property and could get money on it.

(Deposition of Seymour Case.)

"A. I don't recall that particular conversation, but that is the way we felt and no doubt we did tell him Mrs. Hill owned it. We thought she did." [80]

Cross-examination.

Prior to the letter of October 19, 1922, I had conversation and negotiations with Mr. Kearney relative to this loan. Very shortly after Mr. Hill's death I and the Hill boys went to Reno on this Hill business. The first trip was before the deed was secured from Mr. Julian's office. The object of the trip was looking for the deed. Hubert was with me, and I can't recall whether it was Gay or Cleve was the other one. There were three of us. I can't recall whether we met Mr. Kearney on that trip or not. It wasn't later than the second trip that we saw Mr. Kearney relative to some of these transactions. I might have seen him on the first trip. It was at least on the second trip. I could not say for sure whether we saw him on the first trip. If we did and talked with him we wouldn't have known of the deed. Afterwards I don't recall definitely what we said to him about the deed, although I am sure we told him of the existence of the deed, because it was on that we based our belief we could negotiate the loan and asked him to help us. Subsequent to that time we discussed it at length and no doubt I did tell Mr. Kearney, I am positive I did tell him I thought the deed was good and the circumstances of it. I couldn't say his exact words, but I am sure he told me he thought

(Deposition of Seymour Case.)

likewise or he wouldn't have made the loan. He said he would require all the heirs joining in the deed before the loan was made. I can't recall definitely what he did tell me,—of his telling me why, except, I think as a precaution to make the loan safe and so the heirs would be prevented from making trouble in any way. That was my understanding of the reason for them having to sign the papers. It was in a general way to make the loan safe as he could make it. All of these conferences were at Reno. We may have talked some here. Mr. Kearney was up here but I guess it was later in the negotiations. [81] The first transaction when the $8,000 were secured, the negotiations were closed at Reno, but Mr. Kearney came out here in connection with the signing of the papers and he may have come out at that time, but the negotiations were carried on in Reno. I think the $8,000 was paid by Mr. Kearney to me, and I brought it back out. I wouldn't be sure about that or whether it was a later amount, but one check I brought personally back and deposited it in the bank. The $10,000 deposit in the bank may have been sent direct to the bank, but I am sure I brought out his check here, the personal check of Mr. Kearney. I don't recall which one. I don't recall now whether the remaining $42,000 was paid in one amount or how, but I remember bringing the check. I think the $8,000 was used by the Hills to pay Mrs. Lonkey certain amounts. I don't know the exact amount, but it seems to me most of that

(Deposition of Seymour Case.)

amount was paid to Mrs. Lonkey. I am not absolutely sure now whether it was paid for interest on the buying of the ranch or payment on the cattle, interest on the cattle. I can't recall. I know at the time Mr. Hill died, and up to that time that they held a contract for the purchase of the Lonkey ranch and there were payments due on that at the time the $8,000 was borrowed. Whether or not that money was paid on that contract or on the cattle, I can't say. Mrs. Lonkey had a chattel mortgage against the cattle at that time. As to the $42,000, I can't recall exactly how that money was paid. I had something to do with it. I believe I wrote a statement of how the money was paid at that time. (The paper shown to witness.) I wrote that paper myself immediately following the closing of the deal and making the payment of the money to the bank in Reno. It may have been some little time afterward, but my best recollection is it is shortly after I made that, I presume for Mrs. Hill. Refreshing my memory from this statement, [82] I would say those figures are correct as to when the payments were made and the amounts. The last item here is check deposited to account of Mary C. Hill for purchase of cattle, $10,000. That was just as it says there. That much of the money was deposited in the Bank of Lassen County to Mrs. Hill's credit for the purchase of additional cattle to put on the Willow Creek ranch.

(Paper was here admitted in evidence, marked Defendant Mary C. Hill's Exhibit "B," and is as follows:

DEFENDANT MARY C. HILL'S EXHIBIT "B."

"Apportionment of $42,000.00 Received from Patrick Walsh on Loan.
By Seymour Case.

Notes taken up at Farmers & Merchants Bank	$30,000	
Interest on notes, June 15th to Dec. 29th		1,212.50
Fee to Bank's Atty.'s for deed of reconveyance		25.00
Int. on $8,000 loan from Kearney, to date of new loan		167.00
Attorney fees to W. M. Kearney		500.00
Revenue stamps on Walsh note of $42,000		8.40
Chk. deposited to acct. of Mary C. Hill in Lassen Co. Bank		87.10
Total		32000.00
Chk. dep. to acct. of Mary C. Hill for purchase of cattle		10000.00
Grand Total		42000.00.")

I have no record as to how the money was paid out from the first advance of $8,000. I don't know definitely that I had to do with the actual paying

(Deposition of Seymour Case.)

out, but I know the purpose of getting it. The statement you show me in the form of a receipt I don't ever remember of seeing before. The items refresh my memory. It confirms my recollection of the purpose of the loan. I don't know that the purpose of the loan was to secure money to pay Mrs. Lonkey some principal and interest on the Hill Lonkey escrow for the ranch purchase or that the money was gotten for what was most pressing then, but the Lonkey indebtedness, as that indicates, whether it went on cattle or ranch. It is my belief it was paid in about that way. We didn't take the advice of any attorney in connection with the transaction for securing this loan of $50,000. [83]

Cross-examination.

The first item in Exhibit "B," "Notes taken up at Farmers' and Merchants' Bank, $30,000," was the payment of the note or mortgage of Mr. and Mrs. Hill to the Farmers' and Merchants' Bank which was secured by mortgage or deed of trust to Kirman and Harris of the Willow Creek ranch. I don't know how it was made, but it was a trust deed on the ranch. It was a loan and secured by a deed of trust. The next item, "Interest on notes, June 15th to December 29th, $1212.50," meant interest on the same notes to the Farmers' and Merchants' Bank. The next item, "Fee to Bank's Attorneys for deed of reconveyance, $25.00," I understood I was required to pay that as one of the expenses in connection with that loan in the Far-

(Deposition of Seymour Case.)

mers' and Merchants' Bank. It was paid to the bank's attorney. The item, "Interest on $8,000 loan from Kearney to date of new loan, $167.00," was interest on the part of the money Mr. Kearney had already loaned and which was represented by the $8,000 note. After the item, "Attorneys fees to W. M. Kearney, $500.00," I knew that Mr. Kearney really procured Mr. Walsh to join with him in the loan of this money. I went to Mr. Kearney in this matter because I knew him. I had known him for many years, and was friendly with him in every way. I knew, of course, that he was an attorney at that time. I know that he had negotiated and found loans for different people. I don't believe the $500 was ever discussed until the matter was entirely closed up and then it was completed. My recollection is I suggested the amount that would be proper. I do not know of any legal service that he performed for Mrs. Hill at all. I don't know that he saw Mrs. Hill, except the time he went to the house to sign the papers. The transaction was carried on almost entirely by myself and one of Mrs. Hill's sons with Mr. Kearney. [84]

"Q. You didn't ask him for any advice as a lawyer?

"A. We discussed the matter, but I considered him particularly as securing this loan for us. That was the purpose."

The next item, "Revenue stamps on Walsh note of $42000 $8.40," was the revenue stamps on this particular note we gave to Walsh and Kearney.

(Deposition of Seymour Case.)

The next item, "Check deposited to account of Mary C. Hill in Lassen County Bank, $84.10," that was the full amount of balance that went to Mrs. Hill. The next item, "Check deposited to account of Mary C. Hill for purchase of cattle, $10,000," was in fact deposited with the Bank of Lassen County. It was deposited with them under instructions that it should be used for the purchase of cattle on which Mrs. Lonkey would obtain a lien as security for her loan and that in consideration of that she would release her lien or mortgage on the Willow Creek ranch. That was the proposition or purpose of that particular amount of money, to buy the cattle, but I don't know that the bank had instructions to buy them. It seems to me that we went out and Mr. Gay Hill selected the cattle and negotiated the price. Perhaps the bank was to see that they were bought. At that time Mrs. Lonkey, as security for the money that Mrs. Hill owed her, had a mortgage, not only on the cattle but on the Willow Creek ranch. It was part of my arrangement with Mr. Kearney and Mr. Walsh that that mortgage would be released so far as the Willow Creek ranch was concerned, so that they would have a first mortgage on it; on the other hand, I made an arrangement with Mrs. Lonkey that she would release that provided we would use ten thousand dollars of this money for the purchase of cattle on which she would have a chattel mortgage, but I don't know that we were required to use all of the ten thousand dollars, but we were to get so many cattle as addi-

(Deposition of Seymour Case.)

tional security. The ten thousand dollars was used for that purpose as a matter of fact. The purpose of the preliminary loan of eight [85] thousand dollars was on account of the fact that the interest was overdue on the Lonkey loan and the loan from the bank. Both of them were clamoring for their interest. It was a serious situation for my people.

Cross-examination.

I think it was likely there was interest and some principal due on the Lonkey contract for the purchase of the Lonkey ranch from the Hills to Mrs. Lonkey. Interest was overdue on nearly all of the obligations, and she was clamoring for that money as well as the mortgage money, I presume.

Redirect Examination.

In regard to the children of Mrs. Hill signing these notes to Mr. Kearney and Mr. Walsh, this business of Mr. Hill's was being carried on by the children of Mrs. Hill, or some of them. Some of them were actively in charge of the properties. This particular ranch was being managed by Mrs. Hill through some of the boys. Everything was discussed with Mrs. Hill and her consent was gotten before it was done. Mr. Kearney wanted that additional personal security of those children, he must have wanted them. [86]

DEPOSITION OF MISS ALCESTA LOWE, FOR PLAINTIFFS.

Testimony of MISS ALCESTA LOWE, taken by plaintiffs by deposition February 6, 1929.

My name is Alcesta Lowe. In November, 1917, I was a notary public in and for the County of Lassen. My office was at the Lassen County Abstract Company's office. I was acting not only as a notary, but in the capacity of preparing conveyances for the company and typewriting and searching records. I knew Thomas Hill quite well. I remember the occasion of the preparation and acknowledgment and execution of a deed dated the 15th of November, 1917, signed by Thomas Hill and purporting to be acknowledged on the same date by myself, and a deed dated the same day by Thomas Hill to Mary C. Hill, the first one being a conveyance of the home property and the second one being Exhibit "A" attached to the complaint and being the Willow Creek Ranch. I remember when they were executed, but I don't remember the exact dates, but I remember Mr. Hill coming in and having those deeds made out. They were actually prepared in my office and acknowledged in my office. I can't say that I have any further recollection as to anything Mr. Hill said at that time.

Cross-examination.

This deed is on a form of the Lassen County Abstract Company, Susanville, California. Those

((Deposition of Miss Alcesta Lowe.)

forms were supposed to be used only in that office as far as I know. The abstract which you show me I made and is a correct abstract of the record of the trust deed, dated December 15, 1917, from Thomas Hill and Mary C. Hill to Richard Kirman and Walter J. Harris, as trustees of the Farmers' and Merchants' National Bank, being the beneficiaries. I can't say whether these deeds were acknowledged by Mrs. Hill at my office or her house. I think she has been in the office there at different times and I have gone out to her house, but about this particular [87] instrument, I can't say. I can't say whether these deeds were taken away from the office at that time by Mr. Hill or whether they remained in the office for several days. The trust deed to Kirman and Harris was acknowledged on the 15th day of December, 1917, and recorded as of the same day at the request of L. D. Folsom. He resided at Reno, and is now dead. I don't know that he was there at the time the papers were signed, but he was there when the transaction was being closed. The exact time when Mr. and Mrs. Hill signed the papers, I can't say. He had some interest in the money and was very anxious to see it was closed. [88]

TESTIMONY OF W. M. KEARNEY, FOR PLAINTIFFS (RECALLED).

I remember the letter which I received from Mr. C. H. Bridges, cashier of the Bank of Lassen County, already introduced in evidence. The letter

(Testimony of W. M. Kearney.)

is dated December 21, and I think I was in Susanville the day before. I went to the Bank of Lassen County at that time. As I understood it, Mr. Pardee was attorney for the bank at that time. I did not talk with Mr. Pardee. I did not meet him, but I met Mr. Bridges, the cashier. At that time he did not tell me, nor did anybody tell me, that the Bank of Lassen County had these written statements that had been made by Mr. Hill as to the property that he had for the purpose of getting credit. I knew nothing of those until after this suit had started. At the time I and Mr. Walsh loaned this money and took this deed of trust to secure it from Mrs. Hill and her children we did not have any knowledge or information with regard to any such statement ever having been made by Mr. Hill. The first talk I had with Mr. Bridges was shortly after October 6, 1922, when I received a letter from Mr. Seymour Case, who was then acting as Mrs. Hill's agent and doing business for her. At that time they had spoken for the loan and expected to get it from a Mr. Sorgi. In this letter Mr. Case had me hold up the negotiations until Mr. Sorgi could see whether he would make the loan after examining the property. In his letter he said, "Yet, if not, we can no doubt get it from a bonding house or bank, even though at some considerable expense. Bridges will undertake to help us get it in that way if we desire, but we will first talk it over further with you." A few days after that I went to Susanville and talked with Mr. Bridges about it. At that time

(Testimony of W. M. Kearney.)

there was no statement made, whatever, regarding the loan to Mr. Hill personally, or these notices or statements [89] which you have just asked about. At that time we talked over the loan of $50,000, and Mr. Bridges, in a general discussion, said they needed the $50,000, and the question of the $30,000 loan at the Farmers & Merchants Bank at Reno, and the Lonkey $27,200 was still outstanding, and he said that $50,000 was necessory to clean up the pressing indebtedness. They were then negotiating with the Federal Land Bank, trying to get a loan from it. We had a full discussion of the matter at that time at the bank. I did not have my papers prepared at that time for the loan. That was shortly after October 6th. I was instructed to drop it during the time Mr. Sorgi was negotiating about it. In November they asked me for the loan again, and asked if I would not try to get Mr. Walsh to make the loan if he had not made some other disposition of the money. Then on the 19th of December, the 19th or 20th, I don't know which, but I would rather say the 20th of December, I was at Susanville with the papers and talked with Mr. Bridges at that time. He advised me that Mrs. Lonkey had some sort of an agreement with Mrs. Hill regarding the release of this mortgage. We had prior to that time talked it over in a general way. The bank was instructed by Mrs. Lonkey, some instructions that I only knew about in a general way, that if we would deposit with the Lassen County Bank $10,000 of the $50,000 that we

(Testimony of W. M. Kearney.)

were loaning, that she would deposit with them a release of the $27,200 mortgage on the ranch, which was a second mortgage, and give us a clear title to the property in the trust deed given by Mrs. Hill. We had a general and full discussion of it at that time with Mr. Bridges. He was handling the transaction for Mrs. Lonkey, through Mr. Pardee. He advised me that Mr. Pardee was Mrs. Lonkey's attorney. The matter was gone into thoroughly at that time. He knew that we were making the $50,000 loan. The papers [90] were left with him. He had some of the papers there. I am not sure whether I asked him to have Mr. Case, who was acting for Mrs. Hill, record them, or not. The following day, after a full discussion of the entire transaction, what we were doing, and all about it, Mr. Bridges took the $10,000 and got the release of the mortgage and wired me on December 21, 1922, and I have a confirmation of the telegram, I think the original is already in evidence, I am not sure about that, but this is the confirmation:

"December 21, 1922.

"Have in our possession release of mortgage on the Hill Ranch, executed by Georgiana F. Lonkey. Forwarding copy by mail today.

"BANK OF LASSEN COUNTY."

I got a letter from Mr. Case stating that the Bank of Lassen itself might help to get this money. I talked to Mr. Bridges about the substance of that letter. If I am not mistaken, Mr. Case took me

(Testimony of W. M. Kearney.)

down there. Whether he stayed and heard the conversation I could not recall now. At that time they were trying to get the loan from the Federal Land Bank so as to get it at a lesser rate of interest, but it would take too long to get the money in that way, they would have to have an appraisal and they could not get that for some months, and it would not serve the purpose at that time. Mr. Bridges was the cashier of the Lassen County Bank and represented the bank, and he was the man with whom I did all the business. The original $8,000 check which was sent there in September—this was made in two payments, the first $8,000 and then while the negotiations were going on they tried to get it somewhere else, and did have Mr. Sorgi look at the property, and then, through the bank, were trying to get it from the Federal Land Bank, or some bonding house, or bank. As I was about to say the first $8,000 was given by Mr. Case. He cashed the check with the Lassen County Bank, and Mr. Bridges made the remark, as he testified, [91] "I would not give the check unless it was good." I think that is in Mr. Case's deposition. I delivered the $8,000 check to Mr. Case, Mrs. Hill's agent, and it was cashed through the Bank of Lassen County. That was the first $8,000, and then when we closed the final loan I sent $10,000 more to the Bank of Lassen County on account of this matter of Mrs. Lonkey, with instructions not to deliver that $10,000 until we had the release of Mrs. Lonkey's mortgage, which called for $27,200.

(Testimony of W. M. Kearney.)

Cross-examination.

The first talk I had with the officials of the Bank of Lassen County was sometime after the 6th of October. The letter from Mr. Case fixes the date in my mind. I did not have anything in writing from the bank at that time. I talked with Mr. Bridges. I think that Mr. Case was present, but I am not sure. The conversation was at the bank. We had a general discussion. He knew that we were proposing to make a $50,000 loan. We just had a general discussion about the matter as to whether or not they were going to get it from the Federal Land Bank, or what their progress was. I had already advanced $8,000 and all I had was the stock of the Hill Land & Cattle Company and a third mortgage on the ranch. Up to that time there had been no papers made on the $50,000 mortgage, except the $8,000 note and the stock of the Hill Land & Cattle Company, and a third mortgage prepared. It seems to me that is why I went up there, to get that third mortgage or not to record it until the whole loan could be concluded. I again had conversation with Mr. Bridges about the matter either on the 19th or 20th of December at the bank at Susanville. Mr. Bridges was there; I cannot say if anybody else was there. Some officer of the bank, I think it was. In the front end of the bank there was a little alcove there, and I stepped inside the rail. At that [92] time we had a general discussion about the method of releasing the second

(Testimony of W. M. Kearney.)

mortgage of Mrs. Lonkey. I would not advance the money until that second mortgage was out of the way. The first mortgage had already been agreed upon, in Reno, that is, the $30,000 mortgage. He advised me that Mrs. Lonkey, through Mr. Pardee, had made an arrangement with Mrs. Hill that if they would advance $10,000, she would release that second mortgage. That $10,000 was to be deposited with the Bank of Lassen County and used for the purpose of buying cattle to substitute the security of the ranch, that is, as an exchange of security. I am giving the general substance of the conversation. I would not undertake to give it word for word. Mr. Bridges, I think, said that he had an agreement with Mrs. Lonkey. I am not sure whether I had left the release of the mortgage in the form I wanted it or not. And I think possibly the check for $10,000. I left the $10,000 check that day. I am not positive of that, but that is my recollection. It seems to me that at a later time I left other loan papers with Mr. Bridges, or the Bank of Lassen County. My recollection is that the entire set of papers, the trust deed, and everything to be recorded, and I think among them was a power of attorney from a number of the Hill children. That is my recollection and that he and Mr. Case handled the transaction together. [93]

TESTIMONY OF C. H. BRIDGES, FOR DEFENDANTS.

My name is C. H. Bridges. I reside at Susanville, California, and have for fifteen years. I am cashier and managing officer of the Bank of Lassen County, and have been during all of that period. I knew Thomas Hill in his lifetime. He was a customer of the Bank of Lassen County. I was the principal officer in charge of loans and things of that nature. I was the managing officer of the bank. I remember the time of Mr. Hill's death on the 24th of July, 1922. At the time of his death he was indebted to the Bank of Lassen County to the extent of about $8,000. The bank presented the claim to the administratrix of the Estate of Hill on that indebtedness. The total amount of the principal and the date of the claim was $8,450. No part of the indebtedness has since been paid. There has been some interest paid. I knew Mrs. Georgiana F. Lonkey very well. She was a customer of the bank. We acted in an advisory capacity for her as well as handling her banking business. I was familiar with her claims against the Hill estate. By negotiations through me and Mr. Pardee, Mrs. Lonkey released a second mortgage which she held on the land belonging to Thomas Hill during his lifetime. At the time that release was negotiated I advised with Mr. Pardee as Mrs. Lonkey's attorney, and advised also with her. I consulted Mr. Pardee at Mrs. Lonkey's request. She said she held a second mort-

(Testimony of C. H. Bridges.)

gage on Mr. Hill's Willow Creek ranch and a mortgage on some cattle. The Hill heirs wanted Mrs. Lonkey to release the second mortgage from the land, and after talking with her and with you as her attorney, she decided that if they would bring the cattle up to a sufficient count to furnish additional security, she would release the loan. The chattel mortgage on the cattle was security for the same indebtedness [94] that the second mortgage secured. I don't remember the exact amount of cattle that were to be purchased. We figured it for her the same as we would for ourselves, that we should not loan over 60 per cent of the value of the security, and we attempted to bring the security up to that amount.

(Defendants here offered and there was received in evidence the supplemental chattel mortgage that was given by Mrs. Hill and her children to Mrs. Lonkey as additional security for the payment of the note of $27,200, and the same was marked Defendants' Exhibit "C." Said instrument was made by Mary C. Hill, Sadie Case, Cleveland Hill, Christine V. Hill, Thomas Gay Hill, Jimmie O. Hill, Lawrence Hill, Mildred L. Hill, Hubert Hill, Joseph Douglass Hill, Robert Elmer Hill and Florence H. Douglass to Georgiana F. Lonkey, and was dated February 7, 1923, and mlrtgaged 220 head of stock cattle on the Hill ranches in Willow Creek Valley for the security of a promissory note for $27,200, dated July 10, 1921, given by Thomas Hill to Georgiana F. Lonkey, and secured by mortgage

(Testimony of C. H. Bridges.)

given by Thomas Hill and Mary C. Hill upon certain real property, and 680 head of stock cattle, and recited that the lien of said mortgage upon the real estate having been released, this mortgage is given as additional security for the payment of said promissory note. It is further recited that the parties of the first part were the successors in interest of the said Thomas Hill in the 690 head of cattle, and are the owners of the 220 head of cattle thereby mortgaged. It provided further that they might kill the cattle in their business, paying $40 a head therefor.)

(Defendants here offered and there was received in evidence and marked Defendants' Exhibit "D" the duly approved and allowed claim of Bank of Lassen County against the Estate of Thomas Hill, Deceased, for $8,450, and interest at 8 per cent per annum compounded semi-annually from February 15, 1923, on four promissory notes signed by Thomas Hill April 21, 1922, May 13, 1922, May 26, 1922, and June 19, 1922, respectively.) [95]

That $10,000 deposited with us was for the release of Mrs. Lonkey's mortgage. I do not recall that Mr. Kearney's instructions ever had anything to do with the cattle. The agreement as to the number of cattle that should be acquired in order to bring the total number up to the requisite number was made by Mrs. Lonkey and Mrs. Hill. All of the $10,000 was not used in the purchase of cattle under my supervision. Almost $6,000 was used. The Hill boys, and probably Mr. Case had

(Testimony of C. H. Bridges.)

something to do with it, would go out and buy the cattle, give a draft on the bank, and after we were assured that the cattle had been purchased we honored the drafts. We made a sufficient investigation to assure ourselves that title had passed to the Hills for a certain number of cattle, so that the total number was brought up to 900. He was Mrs. Lonkey's representative. I think they drew two drafts on the $10,000. They paid $4,936 for cattle they bought from one man and some $900 from another. When we received the money about December 30, I think we issued a certificate of deposit and put it in escrow. The certificate was drawn for the purpose of the Hill-Lonkey transaction. That was carried that way until January 24, when they drafted on us. At that time we paid out $4,936; then, afterwards another draft for some $900, leaving a balance of $4,097.36, and that amount was turned over to Mrs. Hill, after satisfying herself that there was a sufficient number of cattle. I am acquainted with Mr. Kearney and have known him for over 20 years. I heard his testimony in court this morning. Shortly after the death of Hill, several of the heirs, Hubert W. Hill, Cleveland Hill, Thomas Gay Hill, Joseph D. Hill, all sons of Thomas Hill, deceased, and R. R. McGreggor and Seymour Case, sons-in-law of Thomas Hill, called at our office and negotiated a temporary loan to assist them in their business in the sum of $2,000. That loan was made on the 29th [96] of July, 1922. We had some con-

(Testimony of C. H. Bridges.)

versation at that time. I do not recall just what the conversation was, but they showed us at the time that they needed the $2,000 badly, and we advanced it upon the signatures of all of those men that I named. We took their note. It was paid off in three installments. They were operating this big ranch, and were also operating the butcher shop in town, and it took considerable capital and money to keep it going, so that it would not go to pieces. At that time they did not make any statement to me in regard to the title of the ranch property, where it stood. Under a ruling of the State Bank Department we are supposed to have a financial statement not over twelve months old from every one of our borrowers over $500, and following that rule we took them each year from our borrowers. We are extremely particular about considering them as confidential statements and not as a matter of publicity, because you will find in dealing with all classes of people, some of them object to giving financial statements, and we assure them in every instance that their statement will be held strictly confidential. We go so far as to have a confidential file in our vault, where all of those papers are brought. We are very particular about that, that any statement coming to us and made to us is strictly confidential. That is a rule of the bank, one that I have maintained there. I remember we always had what I considered rather a high value on the Willow Creek ranch. I had knowledge of my own as to the possible value of it. I had a good

(Testimony of C. H. Bridges.)

knowledge as to the value of the Willow Creek ranch, because during Mr. Hill's lifetime I had an opportunity to find a buyer. I had a buyer for that ranch. We could have sold the ranch at one time for $100,000. I presented it to Mr. Hill, but he said it was worth more money than that, and he would not accept it. Referring to the deed by Thomas Hill as far back as [97] 1917, and finally recorded in the records of Lassen County on the 8th day of August, 1922, I first had knowledge of the existence of that record or of that deed after it was put of record. I don't think it was very long after. I had no knowledge of that before it went of record. My bank had no knowledge of it. The Hill children talked to me at one time when they brought Nick Sorgi up from Reno. They were in with him just shortly before he went to the ranch. I think the purpose of that visit was to make a loan upon the Hill ranch. I did not see Mr. Sorgi when he returned from the ranch. Some of the boys talked to him at other times regarding a Federal Land Bank Loan, but I never entered into that, because we were not an agent of the Federal Land Bank, and I did not have anything to do with that.

"Q. During that time, during any of those conversations, did they state to you upon what basis of security they expected or wished to obtain a loan?

"A. By a mortgage on the ranch I presume."

(Testimony of C. H. Bridges.)

I don't recall that they specified the amount that they wanted to borrow. I had knowledge of a trust deed with the Farmers' & Merchants' Bank of Reno in the course of our own indebtedness, but other than that I did not know much about it. I know that at one time he had borrowed money from the Reno National Bank, and also from the Scheeline Bank & Trust Company, but I was not sure of the amount. I do not recall the occasion just referred to by Mr. Kearney as to a certain occasion in October, 1923, when he says he called at the bank and had a discussion on some matters with me, but I do recall that Mr. Kearney never took me into his confidence at all as to what he and his associates were going to do in regard to the Hills. The only time that we ever had any definite instructions or definite talk was at the time that they advanced $10,000 to take up the Lonkey satisfaction of mortgage. I remember the other occasion that he was there in December, 1922. I [98] *I* think it was just prior to or at the time the $10,000 was left there. He never left any papers with me relating to the transaction between himself and Walsh and the Hill heirs to handle for recordation. The only paper that we ever handled for them was the recording of this satisfaction of mortgage from Mrs. Lonkey to the Hills. I do not think he prepared that—I am sure he did not prepare it because at the time I telegraphed him I sent him a copy of that satisfaction of mortgage, so I presume Mrs. Lonkey's counsel prepared that satisfaction. After sending

(Testimony of C. H. Bridges.)

him a copy and before turning over any of the money for the purpose for which it was to be used, and before recording the release, I awaited the receipt of the check. He did not leave the check with me personally when he was in the bank. The correspondence which you have in evidence will disclose that. I wrote him that if he would deposit that amount I would record the satisfaction of mortgage. (Recess.)

I had no knowledge of the amount of the loan that Mr. Kearney was negotiating. I had no knowledge as to the actual lenders of the same. I had no direct knowledge as to what security the lender was to be given for the money loaned. I presumed though that the *the* equity of the heirs of Thomas Hill was furnishing security. I mean the equity the heirs might have in the estate, over and above incumbrances and indebtedness. I was about as close to Mr. Hill in a business way as a banker ordinarily gets with a client. The relationship becomes close. We were quite familiar with most all of his business dealings. The only knowledge I had of the $8,000 advanced preliminarily was that it was deposited in the bank; it was just an ordinary transaction of deposit. I was not charged with any notice as to how it was to be distributed. It was there subject to the order of the person that put it in.

(Witness here identified a deposit tag, marked Defendants' [99] Exhibit "D," showing that on September 27th there was deposited with Mrs. Lon-

(Testimony of C. H. Bridges.)

key, or to her credit in the Bank of Lassen County by Mary C. Hill the sum of $5,830.)

Cross-examination.

The financial statements which the bank is required to keep do not result largely in making copies of the ones that are on file and getting the person to sign them. We go into his financial status each year as they are made up. About the only things that the old statements are used for are to copy descriptions of real estate. We usually arrive at a new basis of valuation. Sometimes the loans against the property change, and we make an entirely new statement each year. My bank did not have any mortgage whatever on the Hills at that time. I do not recall that it ever had a mortgage. I knew Mrs. Hill as well as Mr. Hill, very well. If I had ever taken a mortgage I would undoubtedly have followed the custom of taking the signatures of both the husband and the wife.

"Q. These statements are headed, 'Individual or partnership statements of Thomas Hill, Susanville, California,' Do yau remember whether you had in mind anybody that was in partnership with him at the time of that statement?

"A. No. That was a standard form that we used. In those days we used that particular form. It was imprinted that way and then filled in.

"Q. If some of the property was in his wife's name and he was holding it in partnership with

(Testimony of C. H. Bridges.)

his wife, that in a statement that would be used, is it not? A. Yes.

"Q. Coming to this transaction with Mr. Kearney, when Mr. Walsh loaned this money to Mrs. Hill you had learned before that from some of her children that they were negotiating a loan from somebody.

"A. At the time we advanced them $2000, which I think was in July of 1922, Seymour Case told me that he was going to Reno to see Mr. Kearney because he was a friend of his. As a matter of fact, we were all boys together at the University of Nevada. I don't know whether he told me that through business reasons, or just in a friendly way, but I knew he was going to Reno to see Mr. Kearney. [100]

"Q. For the purpose of negotiating a loan?

"A. For the purpose of getting financial assistance, yes.

"Q. You knew, of course, that there was a $30,000 mortgage to the Farmers & Merchants Bank?

"A. That showed on our statement."

I knew there was a loan to Mrs. Lonkey, because we had these papers in escrow. They did not tell me at that time that they were going to try to take up the Farmers & Merchants loan. I don't know that they ever told me that they were attempting to get a loan from Mr. Kearney to take up all those papers, because they had talked about a Federal Land Bank loan, and the life insurance company loan, and of many different ways. I can-

(Testimony of C. H. Bridges.)

not recall that they ever told me definitely that Mr. Kearney was going to get them a sufficient loan to lift the Farmers and Merchants draft. In talking about these some source, either from Mr. Sorgi or the Federal Land Bank, or an insurance company, I knew they were trying to get someone who would handle their whole finances. It was their intention, if they were able, to get a loan of sufficient size to take care of all the creditors along with these secured loans. When Mr. Kearney came up there and arranged with me to get a release of the mortgage on the Willow Creek ranch, he did not tell me that he was trying to clear the title of that ranch of that lien, so that he vould get a lien on it for his loan. I knew he was trying to clear that second mortgage. I certainly knew that. It certainly would have to be a loan if he cleared it. At that time I did not know, so far as the records were concerned, that loan stood in the name of Mrs. Hill. I knew of the deed after it went of record, but were not those negotiations before that?

"Q. * * * These negotiations that you had with Mr. Kearney were in October and December, were they not, 1922.

"A. December, yes. * * *

"Q. You say you learned of this deed to Mrs. Hill right after it went of record?

"A. I said I learned of it after it went of record, I did not say how soon. [101]

"Q. Didn't you say soon after it went of record?

"A. Yes, soon after, I think.

(Testimony of C. H. Bridges.)

"Q. It is just a little community up there, and you keep track of everything that goes on, don't you?

"A. Oh, no, not necessarily. There is a town there of four thousand people.

"Q. When a deed is put on record your bank gets notice of it? A. No, we don't.

"Q. How did you learn of the deed?

"A. Just through hearsay.

"Q. And it is your recollection that it was shortly after it was put of record. That is your testimony?

"A. I cannot say just how long.

"Q. That is what you testified to this morning, isn't it? A. I believe I did.

"Q. That was put on record in August of that year? A. In August.

"Q. Yes, the first part of August, in fact, on the 8th day of August. * * * How long did you keep the idea that you say you had that this property was worth $100,000?

"A. Well, values a year or so after Mr. Hill's death dropped considerably in farm land.

"Q. * * * About a year after Mr. Hill's death there was a very sharp drop in the value of land, is that right?

"A. Yes, I would say so."

At the time I was having these negotiations with Mr. Kearney by which this mortgage was to be released, in order that he might loan on this property, I not only thought this property was worth $100,000, but I also knew that this transaction by

(Testimony of C. H. Bridges.)

which Mrs. Lonkey was to release this mortgage would bring in to the property, more cattle, or into the estate of Hill, or to Mrs. Hill, or somebody. It would bring in, in *ro*der for the deal to go through, a couple of hundred head more of cattle. I knew that there were about 680 head besides that already covered by the Lonkey mortgage. I knew they were running a butcher concern here in Susanville. I had these statements showing that he valued the property at $364,000. I do not remember who told me about the deed. I think the $8,000 that came in the check from Mr. Kearney on the first [102] loan was deposited in our bank to the account of Mrs. Hill. I would infer it was because she drew on our bank for that amount to place to the credit of Mrs. Lonkey. I am assuming that out of the $8,000 Mrs. Hill immediately paid $5,830 to Mrs. Lonkey. I don't know any other place where she could get the money, and I assume it must have come from Mr. Kearney, and, of course, that is where it did come from. Before I had this final talk with Mr. Kearney I did not personally talk with Sorgi about his proposed loan. Sorgi never talked over the matter of the loan. He told me he was going out on to the Hill ranch, and I did not inquire into his business and he did not tell me what he was going to do. Mr. Kearney did not talk to me when he came up there about the proposition that they were considering getting his money through Mr. Sorgi. Mr. Kearney never called on me very many times. Mr. Kearney paid $10,000

(Testimony of C. H. Bridges.)

to the bank in order to get this release from Mrs. Lonkey. He had absolutely nothing further to do with it, as to whether it bought 6,000 head of cattle, or 4,000 head of cattle, or anything else. That is my understanding; it was simply to get the release of the mortgage. So far as he was concerned Mrs. Lonkey could have taken the entire $10,000.

Redirect Examination.

The transaction or negotiation between me and Mr. Kearney in December, 1922, was for the purpose of securing from Mrs. Lonkey a release of the second mortgage on the Willow Creek ranch. He did not tell me what loan they proposed to make or who the principals were, or asked my advice as to the security, or informed me as to what security they expected to get. [103]

TESTIMONY OF J. E. PARDEE, FOR DEFENDANTS.

I represented Mrs. Lonkey as her attorney in this transaction through which she held a chattel mortgage on the Hill estate. I represented her prior to the time I represented Mrs. Hill. I had knowledge as such attorney of the transaction with reference to the supplemental mortgage which is introduced in evidence, and with reference to the payment of the same. I know how that $27,200 mortgage was paid. In the first place, as the statements were given to me by both parties, the interest on that

(Testimony of J. E. Pardee.)

$27,200 for one year was paid in September, 1922. It amounted, at 6 per cent, to $1,632. Subsequently, but not until 1924, was any other substantial payment made upon it. At that time, October 4, 1924, we made a sale for the Hill estate of cattle. 285 head of cattle were sold to Frank Humphrey. They were covered by the two chattel mortgages that Mrs. Lonkey held. They amounted to $11,818.25. That payment, as applied to principal and interest, was $10,413.79 principal and $1,467.46 interest. After that all the payments that were made on that note were made through me. The cattle were sold from time to time to the Hills Meat Market, which was a corporation known as the Mt. Lassen Packing Co. During the time from the 22d of September, 1925, until the 27th of January, 1926, money came into my hands from the sale of these cattle, and payments were made to the credit of Mrs. Lonkey, which amounted, together with the amount that had been applied on principal out of the Humphrey sale, to the $27,200. In addition to that there was in the final settlement, as computed, $1,196.31 interest that was paid, and on the strength of that Mrs. Lonkey released all her claim to the cattle.

(Such release was thereupon offered in evidence, marked [104] Defendants' Exhibit "E.")

All of the $27,200 note, for the security of which the chattel mortgage was given, was paid from the proceeds of the cattle, except that one year's interest. There was a transaction which the Hills had with Mrs. Lonkey, either in 1921 or 1922. He took

(Testimony of J. E. Pardee.)

an option for the purchase of the Lonkey ranch, which was quite a large ranch in the same valley as the Hill ranch. Afterward, it ripened into an agreement of sale. The deed was drawn and put in escrow in the Bank of Lassen County. The sale price was over $50,000. There was a provision for payments at certain times. There was a provision for interest. There were some payments of principal made and some payments of interest. Eventtually the property was surrendered because we could not carry the transaction through and complete the purchase. Money was paid to Mrs. Lonkey other than the money on this $27,200 note. I did not become attorney for the Hill estate or for Mrs. Hill until after the Kearney-Walsh note was made.

(Defendants then offered in evidence the deed of trust executed by Hill and wife to Richard Kirman and William J. Harris as trustees for the Farmers & Merchants Bank, marked Defendants' Exhibit "F." The same was in all particulars in accordance with the allegations of the complaint in case No. 198, and provided, among other things, that upon the full payment of the indebtedness secured thereby the property should be reconveyed to the parties of the first part, to wit, Hill and his wife, or their heirs or assigns.

They also offered the reconveyance made by the trustees under the said deed of trust to Mary C. Hill, which reconveyance recited the full payment and discharge of the indebtedness secured thereby; that "said Thomas Hill, husband of Mary C. Hill, did

(Testimony of J. E. Pardee.)

on [105] the 15th day of December, 1917, grant, bargain, sell and convey said premises to Mary C. Hill, by deed made, executed and delivered on said date and recorded in the office of the County Recorder of the County of Lassen, State of California, in Book 97 of Deeds, at page 266." The said reconveyance was received in evidence and marked Defendants' Exhibit "G."

They also offered and there was received in evidence a release of the real estate from the mortgage held by Georgiana F. Lonkey and the same was marked Defendants' Exhibit "H." Said release was dated December 20, 1921, and recorded January 3, 1923, and released the Willow Creek Ranch from the mortgage made on the 10th day of July, 1921, by Thomas Hill and Mary C. Hill, recorded on the 23d day of August, 1921, and contained the following provision: "This release is intended to release all land described in, or referred to in said mortgage from the lien thereof, but is not intended to and does not acknowledge the payment of any part of the principal debt secured by said mortgage; neither does it release therefrom any personal property mentioned or described therein.") [106]

After we commenced the probate proceedings in the Estate of Thomas Hill there was a notice of probate sale offering the Willow Creek ranch for sale. That was what precipitated the first action. That was the only attempt to make a legal sale We made some attempt to find a purchaser through

(Testimony of J. E. Pardee.)

different agencies. The offer of sale through the probate proceedings was dated September 10, 1925.

I recall a trustee's sale under this property. It was held at Susanville on the platform in front of the courthouse. I was present, and one af the trustees, Thomas A. Kearney, who has since died. Mr. William H. Kearney was there, and Mr. Patrick Walsh, and two of the Hill boys. I do not remember that anybody else was present.

Cross-examination.

The Lonkey mortgage went back to 1921. The $27,200 plus $1,632 payments which I have testified to would not discharge the $27,200 with interest from 1921 to 1926. I know that we paid that much. I knew that at the time that Mr. Kearney advanced the $8,000 certain portions of that went to pay money to Mrs. Lonkey, $5,830 to pay her off for certain amounts. That money was given to pay Mrs. Lonkey anything that was accrued in the way of interest and past dues, and at that time there was only a little more than one year's interest accrued. All I know of my own knowledge are the payments which I have testified to and the transaction with Humphrey. Taking all that into consideration there might have been some, and should have been some more paid between September, 1922, and 1924. I do not know whether the sale to Humphrey included the cattle bought with the $10,000 put up by Mr. Kearney and Mr. Walsh. I know that shortly after this litigation started a stipulation [107] was en-

(Testimony of J. E. Pardee.)

tered into between myself and Mr. Kearney that the property could be sold at any time provided Kearney and Walsh were paid the amount that was owed them. It was made at Sacramento and approved by Judge Kerrigan. So there was plenty of opportunity to sell the property, but not a very good market. In the account in the Estate of Thomas Hill covering the period from August 1, 1922, to December 31, 1923, there is an item "Paid on principal and interest of G. F. Lonkey note and mortgage, $1,700."

Defendants then offered in evidence the affidavit of the publisher of the notice of publication of said sale, and the same was admitted in evidence and marked Defendants' Exhibit "I." The said notice was dated September 10, 1925, and, among other things, contained the following provision: "It is understood that parcel one (Willow Creek Ranch) is subject to an incumbrance, but bids should be made on the basis of a clear title, all valid indebtedness to be paid by the estate, or to be deducted from the gross purchase."

Defendants also offered and there was received in evidence, and marked Defendants' Exhibit "J," the articles of incorporation of Patrick Walsh and Sons, Incorporated. Said articles were dated January 19, 1918, and provided that the capital of said corporation should be $400,000, divided into 4,000 shares of $100 each, of which Patrick Walsh subscribed six shares, William R. Walsh one share, and John M. Walsh, one share, Patrick H. Walsh one share and Mary Walsh one share.

Defendants then offered in evidence the original complaint of plaintiffs in case No. 198, and the same was admitted in evidence, and, omitting the exhibits attached thereto, is as follows: [108]

"In the United States District Court of the Northern District of California, Northern Division.

"IN EQUITY—No. 198.

JOHN M. WALSH and THOMAS A. KEARNEY, as Trustees, and W. M. KEARNEY and PATRICK WALSH,

Complainants,

vs.

MARY C. HILL, MRS. SADIE CASE, CLEVE HILL, JOSEPH HILL, ROBERT ELMER HILL, THOMAS GAY HILL, LAWRENCE HILL, JESSIE I. HILL, JIMMIE O. HILL, FLORENCE HILL DOUGLAS, HUBERT W. HILL, MILDRED L. HILL, CHRISTINE V. DeFOREST, MAUD B. McGREGOR, MARY C. HILL, as Administratrix of the Estate of THOMAS HILL, Deceased, JOHN DOE, RICHARD ROE, SALLY MOE First and SALLY MOE Second,

Defendants.

"COMPLAINT.

"Comes now your complainants, John M. Walsh and Thomas A. Kearney, as Trustees, and W. M. Kearney and Patrick Walsh and complain of de-

fendants, Mary C. Hill, Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglas, Hubert W. Hill, Mildred L. Hill, Christine V. DeForest, and Maud B. McGregor, and Mary C. Hill, as administratrix of the Estate of Thomas Hill, deceased, John Doe, Richard Roe, Sally Moe First and Sally Moe Second, above named and for cause of suit allege:

"I.

"That the complainants, John M. Walsh, Thomas A. Kearney, W. M. Kearney and Patrick Walsh, and each of them, are residents and inhabitants of the state and district of Nevada. [109]

"II.

"That the said defendants, Mary C. Hill, Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglas, Hubert W. Hill, Mildred I. Hill, Christine V. DeForest, Maud B. McGregor, Mary C. Hill, as Administratrix of the Estate of Thomas Hill, deceased, John Doe, Richard Roe, Sally Moe First and Sally Moe Second, now are and each of them is and was at all the time and dates hereinafter mentioned citizens, residents and inhabitants of the State of California.

"III.

"That the matter in controversy in this suit, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars ($3,000.00) as is hereinafter more particularly alleged.

"IV.

"That on May 25, 1923, Mary C. Hill was appointed as administratrix of the Estate of Thomas Hill, Deceased, and thereafter duly qualified as such, and is now and at all times after said date last mentioned, has been the duly qualified and acting administratrix of the Estate of Thomas Hill, Deceased.

"V.

"That the defendants Mary C. Hill, Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglas, Hubert W. Hill, Mildred L. Hill, Christine V. DeForest and Maud B. McGregor are indebted to the complainants Patrick Walsh of Austin, Nevada, and W. M. Kearney, of Reno, Nevada, in the sum of Fifty Thousand Dollars ($50,000.00) with interest from the first day of February, 1924, on two promissory notes in the words and figures following, to wit: [110]

"$8000.00. Reno, Nevada.
December 20th, 1922.

"McDow xxx 'One year after date, without grace, for value received, we, or either of us, promise to pay to M. Kearney, or order, at Reno, Nevada, the sum of Eight Thousand Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of eight per cent. per annum from date until paid. Interest payable semi-annually, also after judgment.

" 'The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker or makers thereof, or either of them. In the event of the non-payment of this said note at maturity, or at its collection by suit, we, or either of us, agree to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end bind ourselves, our heirs, executors, administrators and assigns forever. For the purpose of attachment or levy of execution, this note shall be payable wherever we, or either of us, may be situated, at the option of the holder.

" 'MARY C. HILL.
" 'MRS. SADIE CASE.
" 'CLEVE HILL.
" 'JOSEPH HILL.
" 'ROBERT ELMER HILL.
" 'THOMAS GAY HILL.
" 'LAWRENCE HILL.
" 'JESSIE I. HILL.
" 'JIMMIE O. HILL.
" 'FLORENCE HILL DOUGLAS.
" 'HUBERT W. HILL.
" 'MILDRED L. HILL.
" 'CHRISTINE V. DeFOREST.
" 'MAUD B. McGREGOR.
" 'By MARY C. HILL,
" 'Their Attorney-in-fact.

" '(1.60 Documentary stamps canceled)'

"$42,000.00. Reno, Nevada,
December 20th, 1922.

"McDow xxx 'Three years after date, without grace, for value received, we or either of us, promise to pay to PATRICK WALSH, or order, at Austin, Nevada, the sum of Forty-two Thousand Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of eight per cent. per annum from date until paid. Interest payable semi-annually, also after judgment. [111]

" 'The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker or makers thereof, or either of them. In the event of the non-payment of this said note at maturity, or its collection by suit, we, or either of us, agree to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end bind ourselves, our heirs, executors, administrators, and assigns forever. For the purpose of attachment by levy or execution, this

note shall be payable wherever we, or either of us, may be situated, at the option of the holder.

"'MARY C. HILL.
"'MRS. SADIE CASE.
"'CLEVE HILL.
"'JOSEPH HILL.
"'ROBERT ELMER HILL.
"'THOMAS GAY HILL.
"'LAWRENCE HILL.
"'JESSIE I. HILL.
"'JIMMIE O. HILL.
"'FLORENCE HILL DOUGLAS.
"'HUBERT W. HILL.
"'MILDRED L. HILL.
"'CHRISTINE V. DeFOREST.
"'MAUD B. McGREGOR.
"'By MARY C. HILL,
"'Their Attorney-in-fact.'

"VI.

"That at the time of delivering said notes and each of them and to secure the payment of said principal sum and the interest thereon as mentioned in said notes according to the tenor thereof, the defendants duly executed and delivered to the plaintiffs herein, John M. Walsh and Thomas A. Kearney, as Trustees, their deed of trust bearing date the 20th day of December, 1922, conveying the following described premises:

The W. ½ of NW. ¼, SE. ¼ of NW. ¼ and the SW. ¼ of Section 2; the E. ½, SW. ¼, S. ½ of NW. ¼ and the NW. ¼ of NW. ¼

of Section 3; the E. ½, S. ½ of SW. ¼ and the NE. ¼ of SW. ¼ of Section 4; the E. ½ of NE. ¼ and the SE. ¼ of Section 8; the N. ½ of N. ½ of SE. ¼ and W. ½ of SW. ¼ of Section 9; the N. ½ of N. ½ and SW. ¼ of NW. ¼ of Section 10; the W. ½, W. ½ of E. ½ and the E. ½ of SE. ¼ of Section 11; the NE. ¼ of NW. ¼ and the W. ½ of NE. ¼ of Section 14; also a piece of land bounded as follows: Beginning at a point 10 chains west of the corner of Sections 11–12–13 and 14 and running thence South 15 chains; thence South 58° 45′ West, 11.72 chains to the quarter-quarter line; [112] thence north along said quarter-quarter line 21.10 chains to the line between Sections 11 and 14; thence east 10 chains to the place of beginning, being in said Section 14, all in township 31 North, Range 12 East, M. D. M.

Also the SE. ¼ of SE. ¼ of Section 34, and the W. ½ of SW. ¼ of Section 35, in Township 32 North, Range 12 East, M. D. M.

Also the N. ½ of SW. ¼ of Section 2, and the E. ½ of SE. ¼ of Section 3, in Township 31 North, Range 11 East, M. D. M., containing in all 3,218.58 acres, more or less according to Government Survey.

A copy of said trust deed is attached hereto and marked 'Exhibit A' which the complainants request be considered as though plead *in haec verba.*

"VII.

"That the said trust deed was duly acknowledged

and certified so as to entitle it to be recorded, and on the 3d day of January, 1923, the same was duly recorded in the office of the County Recorder of Lassen County, California, at page 249 and following, in Book C of Trust Deeds.

"VIII.

"That among other things it is provided in said trust deed to secure the payment to the said parties of the third part (W. M. Kearney and Patrick Walsh) of the sum of Eight Thousand Dollars ($8,000.00) and Forty-two Thousand Dollars ($42,000.00), respectively, lawful money of the United States of America, and interest thereon according to the terms of the two promissory notes set forth herein, made, executed and delivered by the said parties of the first part and payable to the order of said parties of the third part (W. M. Kearney and Patrick Walsh) respectively; also, to secure the payment of any and all sums of money, checks, bills, promissory notes, bonds, liens, balances of account, overdrafts or other indebtedness, which are [113] now, or may hereafter during the continuance of this trust, be, or become, due or owing from the parties of the first part (defendants herein), or either of them, to the said parties of the third part (W. M. Kearney and Patrick Walsh), or for which said parties of the first part (defendants herein), or either of them, may be, or shall become in any manner liable to the said parties of the third part (W. M. Kearney and Patrick Walsh) together with interest on all such indebtedness, from

the date and creation of the same to the date of the repayment to the said parties of the third part (W. M. Kearney and Patrick Walsh), at the rate of eight per cent per annum on all such indebtedness, or such other rate as may be agreed upon where the indebtedness is evidenced by an instrument in writing. Also, to secure the repayment, on demand, of any sum, or sums, advanced at any time during the continuance of this trust by the party of the third part (W. M. Kearney and Patrick Walsh), for the payment of any taxes, assessments, liens or encumbrances now subsisting or which may hereafter be levied or imposed upon said premises, or any part thereof, which, may, in the judgment of the parties of the third part (W. M. Kearney and Patrick Walsh) affect such premises or this trust. Also, to secure the repayment, on demand, of any and all sums paid out by the parties of the second part (plaintiffs) John M. Walsh and Thomas A. Kearney as Trustees herein or third part (W. M. Kearney and Patrick Walsh) in intervening in, prosecuting or defending any action or proceeding, wherever, in their judgment, it may be necessary to do so, in order to protect the title to said property or this trust; also, to secure the repayment by parties of the first part (defendants herein), of the expenses incurred for such repairs or prevention of waste upon said premises as may have been deemed [114] necessary by parties of the third part (W. M. Kearney and Patrick Walsh), or their successors or assigns. Also, to secure the payment of interest on all of said ad-

vances and expenses from the time they are made or incurred to the time of repayment, at the rate of eight per cent per annum, payable semi-annually, after the 20th day of December, 1922, or such other rate as may be expressly agreed upon in writing.

"Said trust deed further provides: 'If default shall be made in the payment of said note first mentioned, or any portion thereof, or any installment of interest thereon when due, or any indebtedness evidenced by any instrument in writing, as aforesaid, or in the re-imbursement of any moneys, as herein provided to be paid out and expended, or any advances or taxes, liens, encumbrances, etc., or any other sum due to parties of the third part, with the interest thereon, on demand, as hereinabove expressed, then it shall be lawful for the parties of the second part, or the survivor of them, their successors or assigns, on the application of the parties of the third part, or their successors or assigns, to sell the above granted premises, or such part thereof, as in their discretion, they shall find it necessary to sell in order to accomplish the objects of this trust.'

"Said trust deed further provides: 'The parties of the second part, or the parties of the third part, may commence, prosecute, intervene in, or defend any action or proceeding in any court of competent jurisdiction, whenever, in their judgment it may be necessary to do so, in order to protect the title to said property, and may at any time, at their option, commence and maintain suit in any court of competent jurisdiction to obtain the aid and direction

of said court in the execution by them of the trusts, or any of them herein expressed or contained, and may [115] in such suit obtain orders or decrees, interlocutory or final, of said court, directing the execution of said trust, and confirming and approving their acts, or any of them, or any sales or conveyances made by them, and adjudging the validity thereof, and directing that the purchasers of the lands and premises sold and conveyed be let into immediate possession thereof, and providing for orders of court or other process, requiring the sheriff of the county in which said lands and premises are situated to place and maintain the said purchasers to quiet and peaceable possession of the lands and premises so purchased by them, and the whole thereof.

"In case default be made in the payment of any sum or sums hereinabove mentioned, the Trustees, their successors or assigns, shall be entitled at any time, at their option, and either by themselves, or by their duly authorized agent, to enter upon and take possession of the above granted premises, or any part thereof, and remove all persons therefrom, and do and perform such acts of repair or cultivation, as may be necessary or proper to conserve the value thereof, and to collect and receive the rents, issues and profits thereof, and apply the same in the manner hereinbefore specified in respect of proceeds of sale of said premises, and to do such other acts and to exercise such other power in respect to said premises as said trustees may deem necessary or proper to conserve the value thereof, and the

expenses therein incurred shall be deemed to be a portion of the expense of this trust, and secured thereby as hereinbefore provided.

"IX.

"That the defendants, first parties named in said trust deed have failed, neglected and refused to pay the interest on [116] said notes since the first day of February, 1924, and are in default thereof for a period of more than one year; that the defendants have failed, neglected and refused to pay the note of Eight Thousand Dollars ($8000.00) hereinabove mentioned dated December 20, 1922, due and payable one year after date, and are in default in the payment of said note.

"That demand has been made upon defendants for the payment of said note and principal sum and sums above stated but that notwithstanding said demand the defendants still and now continue to refuse to pay the said interest or principal or any part thereof.

"That according to the terms of said trust deed the entire principal sum represented by the two promissory notes, to wit: Eight Thousand Dollars ($8000.00) and Forty-two Thousand Dollars ($42,000.00) respectively, together with the interest thereon from the first day of February, 1924, is now due, owing and unpaid from the defendants to the complainants W. M. Kearney and Patrick Walsh, parties of the third part mentioned in said trust deed.

"X.

"That the parties of the third part in said trust deed, namely, W. M. Kearney and Patrick Walsh, have applied for and requested the said trustees to bring this action and also to sell the said premises in accordance with the terms of said trust deed.

"XI.

"That at the time of the delivery of said notes aforesaid and to further secure the payments of said principal sum and interest, costs, advances, and attorney fees as mentioned in said notes according to the tenor thereof defendants, Mary C. Hill, Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill, [117] Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglas, Hubert W. Hill, Mildred L. Hill, Christine V. DeForest and Maud B. McGregor, duly made, executed, and delivered to complainants, W. M. Kearney and Patrick Walsh, their chattel mortgage bearing date the 20th day of December, 1922, conveying the following personal property:

> 1 mare branded 'E H' on left stifle; 2 mares branded 'F D' on left shoulder; 11 horses branded 'A J' on right shoulder; 4 horses branded 'C L' on left shoulder; 4 work horses, 2 work mares and 2 saddle horses (brands not distinguishable); 1 grey percheron stallion, weight about 1800 lbs. (no brand); 2 sets driving harness; 10 sets leather work harness; 2 spring wagons; 4 farm wagons with hay racks; 2 wagons with farm beds; 2 Deering mowers; 2

John Deere mowers; 1 International side delivery rake; 1 Moline; 1 Deering sulkey rake; 5 Dane buckrakes; 2 P. and O. fine bottom tractor plows; 1 Holt 6 disk tractor plow; 1 45 H. P. Holt tractor #20,577; 1 J. I. C. 32–54 separator, No. 22,879;

Also all other implements on the ranch not enumerated and tools and equipment of the blacksmith and harness shops and other buildings, all of said property being situated on the Hill Willow Creek Ranch, Lassen County, California; also the crops on said ranch and to be grown thereon subject to the condition that said crops may be used while the conditions of this mortgage and a certain trust deed of even date by Mary C. Hill, et al., to Patrick Walsh and W. M. Kearney are fulfilled and in good standing but this right of use ceases immediately upon there being a default in any of the conditions of either of said aforesaid instruments.

"Said mortgage was conditioned as set forth in the said chattel mortgage which is attached hereto and marked 'Exhibit B, which complainants request the Court to consider as having been plead *in haec verba.*

"XII.

"That said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and on the 3d day of January, 1923, the same was duly recorded in the office of the County Recorder of

Lassen County, California, in Book I of Chattel Mortgaged, at page 410 and following. [118]

"XIII.

"That complainants, W. M. Kearney and Patrick Walsh, are the owners and holders of said promissory notes and chattel mortgage; that the defendants claim to have some interest in or lien on said mortgaged premises, but all of said claims, if any, are junior and subordinate to the lien of plaintiffs created by virtue of said chattel mortgage.

"XIV.

"That Mary C. Hill, as administratrix of the Estate of Thomas Hill, deceased, claims some right, title or interest in or lien on the said described premises, but that all of said claims, if any, are junior and subordinate to the title evidenced by said trust deed.

"XV.

"That defendants John Doe, Richard Roe, Sally Moe First and Sally Moe Second claim some right, title or interest in or to the premises hereinabove described in said trust deed, their true names being unknown to the complainants but whose claims are wholly fictitious, junior and subordinate to the rights and claims of complainants herein; that their true names will be substituted when and if ascertained.

"XVI.

"That according to information and belief defendant Mary C. Hill, as Administratrix of the Estate of Thomas Hill, deceased, threatens to sell

the said premises in disregard of said trust deed and to create a cloud upon the title of said property described in the trust deed aforesad and is about to perform acts offering the said property for sale in such manner, as complainants are informed and believe, as will create a cloud upon the right and title of the complainants herein, John M. [119] Walsh and Thomas A. Kearney, and in and to the said premises as well as the title to the premises, and to that end as complainants are informed and believe the said defendant Mary C. Hill, as administratrix of the Estate of Thomas Hill, Deceased, is advertising the said property for sale in disregard of the legal title expressed in said deed, well knowing that the legal title thereto stands in the complainants, John M. Walsh and Thomas A. Kearney, as Trustees.

"XVII.

"That the complainants have no plain, speedy, or adequate remedy at law in that the defendants and each of them is, according to information and belief, insolvent and unable to respond in damages; that the acts complained of which are about to be performed as herein alleged in placing a cloud upon the right and title of complainants, will cause a multiplicity of suits; that the damages resulting therefrom to the complainants mentioned in said trust deed will be irreparable and of such a character that they cannot be readily measured in terms of dollars and cents, and that complainants only redress is in a court of equity.

"WHEREFORE complainants pray the aid of the Honorable Court that the defendants and each and every one of them, their attorneys, agents, servants, and all persons acting by or through or for them be restrained and enjoined from doing any act or thing which would in any way impair the right or title of complainants in and to the premises described in the said trust deed referred to in the complaint and from selling or making a purported sale of said premises described in the complaint, except in full recognition of the rights and title of the complainants as expressed in the said trust deed herein, and from doing any [120] act or thing which would defeat the title, purpose or intent expressed in said deed of trust, and from in any way or manner interferring with the rights of complainants in carrying out the trust or the sale of said premises according to the true intent and meaning expressed in said trust deed upon the default as pleaded herein.

"Complainants further pray for an order and decree authorizing the sale of said property mentioned in the chattel mortgage pleaded herein according to law and the practice of this court and the proceeds applied in payment of the amount due to the complainants W. M. Kearney and Patrick Walsh.

"That the defendants, Mary C. Hill, Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglas, Hubert W. Hill, Mildred L. Hill, Christine V. DeForest, Maud B. McGregor, and Mary C. Hill, as administratrix

of the Estate of Thomas Hill, Deceased, and each of them, and all persons claiming under them, either as purchasers, encumbrancers or otherwise, may be barred and foreclosed of all rights, claim or equity of redemption in the said personal property covered by said chattel mortgage and every part thereof and that defendants may be adjudged to pay any deficiency which may remain after applying all the proceeds of the sale of said personal property properly applicable to the satisfaction of said judgment.

"That the complainants, W. M. Kearney and Patrick Walsh, have judgment against the defendants, Mary C. Hill, Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglas, Hubert W. Hill, Mildred L. Hill, Christine V. DeForest and Maud B. McGregor, for the sum of Fifty Thousand [121] Dollars ($50,000.00) together with interest thereon at the rate of eight per cent per annum from December 20, 1922, calculated semi-annually on the 20th day of June and the 20th day of December of each year with interest upon said interest from the said interest due dates as specified herein, crediting the following interest payments on account:

June 23, 1923—$2000.00
Feb. 7, 1924—$1000.00
Oct. 29, 1924—$ 750.00
Nov. 15, 1924—$ 750.00

"That the complainants may be a purchaser or purchasers at said sale.

"For costs of suit and for attorneys fees in the sum of ten per cent of the amount of said judgment.

"That the complainants, John M. Walsh and Thomas A. Kearney, as Trustees, be authorized to take immediate possession of the real premises described in the complaint pursuant to the terms of said trust deed.

"That the Court confirm the execution by the Trustees of the trust specified in said trust deed authorizing and confirming the sale which Trustees are now about to make, and adjudging the validity thereof and all the details according to the powers expressed in said trust deed.

"That the complainants may have such other and further relief in the premises as to this court may seem just and equitable, including the relief that the pleadings and proof may warrant.

"W. M. KEARNEY,
"W. K. S. BROWN,
"Solicitors for Plaintiffs. [122]

"State of Nevada,
County of Washoe,—ss.

"Thomas A. Kearney, being first duly sworn, deposes and says:

"That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true;

that he makes this verification for and on behalf of the plaintiffs.

"THOMAS A KEARNEY.

"Subscribed and sworn to before me this 24th day of September, 1925.

"[Seal] GEORGIA NEWMAN,

"Notary Public in and for Washoe County, Nevada." [123]

The foregoing is submitted by the plaintiffs as a condensed statement of the testimony and evidence in the above-entitled action.

W. M. KEARNEY,
N. J. BARRY,
EDWARD F. TREADWELL,
Solicitors for Plaintiffs.

The foregoing condensed statement of the testimony and evidence in the above-entitled suit being correct, the same is hereby approved.

Dated Feb. 10, 1930.

FRANK H. KERRIGAN,
District Judge.

Due service and receipt of copy of within acknowledged this 24th day of January, 1930.

J. E. PARDEE and
R. M. RANKIN.

[Endorsed]: Lodged Jan. 29, 1930.

[Endorsed]: Filed Feb. 10, 1930. [124]

[Title of Court and Cause—Nos. 198–Eq.—208–Eq.]

Before KERRIGAN, District Judge.

November 22, 1929.

MEMORANDUM OPINION.

On examination of the records in these two cases, I reach the following conclusions:

1. There was no delivery of the deed to the property involved herein from Thomas Hill to his wife, Mary C. Hill, during the lifetime of the grantor.

2. Patrick Walsh & Sons, Incorporated, W. M. Kearney and Patrick Walsh failed to obtain a valid first lien on the fee-simple title to the property involved herein.

3. There is no estoppel against the estate of Thomas Hill which will preclude Mary C. Hill, as administratrix, from denying the delivery of the above-mentioned deed, either by way of defense in No. 198, or as plaintiff in No. 208. [125]

4. There is no estoppel against the Bank of Lassen County which will preclude it from denying the delivery of the same deed.

5. Mary C. Hill, individually, and the other heirs of Thomas Hill joining in the trust deed are estopped to deny the validity of the lien thus created, and any right or title in or to the property, or moneys acquired from a probate sale thereof, to which they may be entitled as heirs at law of Thomas Hill, is subject to said deed of trust.

6. Patrick Walsh & Sons, Incorporated, W. M. Kearney and Patrick Walsh are not entitled to be subrogated to the prior liens upon the property discharged with funds loaned on security of the invalid trust deed. The right to subrogate involves the application of a rule of property, as to which this court will conform to the decisions of the courts of the State of California where the land is situated. Under the rule of Brown vs. Rouse, 125 Cal. 645, and Guy vs. Du Prey, 16 Cal. 196, there is no right of subrogation here. See, also, note, 43 A. L. R. 1393, 1400.

Let decrees be prepared in the respective cases in accordance with these conclusions. The several parties to bear their own costs.

FRANK H. KERRIGAN,
U. S. District Judge.

[Endorsed]: Filed Nov. 22, 1929. [126]

In the Northern Division of the United States District Court, for the Northern District of California.

IN EQUITY—No. 198.

PATRICK WALSH & SONS INCORPORATED, a Corporation, W. M. KEARNEY and PATRICK WALSH,

Complainants,

vs.

MARY C. HILL, MRS. SADIE CASE, CLEVE HILL, JOSEPH HILL, ROBERT ELMER

HILL, THOMAS GAY HILL, LAWRENCE HILL, JESSIE I. HILL, JIMMIE O. HILL, FLORENCE HILL DOUGLAS, HUBERT W. HILL, MILDRED L. HILL, CHRISTINE V. DeFOREST, MAUDE B. McGREGOR, MARY C. HILL, as Administratrix of the Estate of THOMAS HILL, Deceased, JOHN DOE, RICHARD ROE, SALLY MOE FIRST and SALLY MOE SECOND, and MARY C. HILL, as Substituted Defendant for CLEVE HILL, Deceased,

Defendants.

DECREE.

This cause came on to be heard on the 6th day of July, 1928, and evidence being offered the cause was thereafter argued by counsel, and the Court having made and filed its Memorandum Opinion herein on the 19th day of October, 1928; and the plaintiffs having thereafter, and before the entry of decree herein, been granted permission by the Court to amend their complaint, and an answer to said amended complaint having been filed, and further evidence having been taken and heard by the Court on the 6th day of May, 1929, and the cause again argued by counsel; the Court, on November 22, 1929, ordered that a decree be signed, filed and entered herein in accordance with the memorandum opinion of the Court on file,—

IT IS HEREBY ORDERED, ADJUDGED and DECREED, in accordance with said Memorandum Opinion, as follows, to wit:

(1) That the certain deed set forth in the pleadings, executed by Thomas Hill as grantor, to Mary C. Hill, his wife, as grantee, [127] and dated December 15, 1917, was not delivered to the grantee during the lifetime of the grantor and did not operate to convey to said grantee any title to the land therein described.

(2) That thereafter the said Thomas Hill died intestate and the title to said lands vested in his heirs at law, subject, however, to administration, and to the power of the Court in probate to subject the said property to the payment of the decedent's debts, the family allowance, and expenses of administration; and that, therefore, the plaintiffs herein are not entitled to quiet their title as against the defendant Mary C. Hill, as administratrix of the estate of Thomas Hill, deceased.

(3) That Patrick Walsh and Sons, Incorporated, W. M. Kearney, and Patrick Walsh failed to obtain a valid first lien on the property involved herein, by, through, or under the deed of trust set out in plaintiffs' bill of complaint herein.

(4) That there is no estoppel against the estate of Thomas Hill, deceased, which precludes Mary C. Hill, as administratrix of said estate, from denying the delivery of the deed above mentioned from Thomas Hill to his wife, Mary C. Hill.

(5) That Mary C. Hill, individually, and the other heirs at law of Thomas Hill, deceased, who

joined in the execution of said deed of trust, are estopped to deny the lien created by said deed of trust; and that any right or title in or to the property or moneys acquired, or to be acquired, from a probate sale of said property, to which they may be entitled as heirs at law of said Thomas Hill, deceased, or otherwise, is subject to said deed of trust, and must be paid (or distributed) to the plaintiffs in this action.

(6) That Patrick Walsh & Sons, Incorporated, W. M. Kearney and Patrick Walsh are not entitled to be subrogated to the prior liens upon the property involved herein, which prior liens were discharged with the funds loaned on the security of the aforesaid [128] deed of trust.

(7) That the several parties hereto shall each bear their own costs.

(8) The lands hereinbefore referred to and affected by this decree are situate in the County of Lassen, State of California, and are described as follows, to wit:

The W. ½ of NW. ¼, SE. ¼ of NW. ¼ and the SW. ¼ of Section 2; the E. ½, SW. ¼, S. ½ of NW. ¼ and the NW. ¼ of NW. ¼ of Section 3; the E. ½, S. ½ of SW. ¼ and the NE. ¼ of SW. ¼ of Section 4; the E. ½ of NE. ¼ and the SE. ¼ of Section 8; the N. ½, N. ½ of SE. ¼ and the W. ½ of SW. ¼ of Section 9; the N. ½ of N. ½ and the SW. ¼ of NW. ¼ of Section 10; the W. ½, W. ½ of E. ½, and the E. ½ of SE. ¼ of Section 11; the NE. ¼ of NW. ¼ and the W. ½ of NE. ¼ of Section 14;

also a piece of land bounded as follows: Beginning at a point 10 chains west of the corner of Sections 11–12–13 and 14, and running thence South 15 chains; thence South 58° 45′ West, 11.72 chains to the quarter-quarter line; thence north along said quarter-quarter line 21.10 chains to the line between Sections 11 and 14; thence east 10 chains to the place of beginning, being in said Section 14, all in Township 31 North, Range 12 East, M. D. M.

Also the SE. ¼ of SE. ¼ of Section 34, and the W. ½ of SW. ¼ of Section 35, in Township 32 North, Range 12 East, M. D. M.

Also the N. ½ of SW. ¼ of Section 2, and the E. ½ of SE. ¼ of Section 3, in Township 31 North, Range 11 East, M. D. M., containing in all 3,218.58 acres, more or less, according to Government Survey.

Given this 13th day of December, 1929.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed and entered Dec. 14, 1929. [129]

[Title of Court and Cause.]

PETITION FOR ORDER ALLOWING APPEAL.

To the Honorable the Judges of the United States District Court for the Northern District of California:

The complainants above named, feeling themselves aggrieved by the judgment of this Honorable Court made and entered in this cause on the 12th day of December, 1929, do, through their undersigned attorneys, respectfully petition and pray for the allowance of an appeal from said judgment to the United States Circuit Court of Appeals of the Ninth Circuit under and according to the laws of the United States in such cases made and provided, and that an order be made fixing the amount of security to be given by the complainants and appellants, conditioned as the law directs; and that upon the giving of such bond as may be required, all further proceedings be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals, and [130] that this court further make an order herein continuing in force pending said appeal the temporary injunction heretofore granted by said court.

W. M. KEARNEY.
N. J. BARRY,
EDWARD F. TREADWELL,
Solicitors for Complainants and Appellants.

[Endorsed]: Filed Jan. 20, 1930. [131]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now come the complainants above named and in connection with their petition for an order allowing an appeal in said cause, assign the following errors which they aver occurred on the trial thereof, and upon which they rely to reverse the judgment entered herein as appears of record:

1. The Court erred in holding that there was no delivery of the deed to the property involved herein from Thomas Hill to his wife, Mary C. Hill, during the lifetime of the grantor.

2. The Court erred in holding that Patrick Walsh & Sons, Inc., W. M. Kearney and Patrick Walsh failed to obtain a valid first lien on the fee-simple title to the property involved herein.

3. The Court erred in holding that there is no estoppel against the estate of Thomas Hill which will preclude Mary C. Hill, as administratrix, from denying the delivery of the above-mentioned deed. [132]

4. The Court erred in holding that there is no estoppel against the Bank of Lassen County which will preclude it from denying the delivery of the said deed.

5. The Court erred in holding that Patrick Walsh & Sons, Inc., W. M. Kearney and Patrick Walsh are not entitled to be subrogated to the prior liens upon the property discharged with funds

loaned on security of the deed of trust made by said Mary C. Hill to complainants.

WHEREFORE, said complainants and appellants pray that the said decree be reversed.

W. M. KEARNEY,
N. J. BARRY,
EDWARD F. TREADWELL,
Solicitors for Complainants and Appellants.

[Endorsed]: Filed Jan. 20, 1930. [133]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The complainants above named having heretofore filed their petition for an order allowing an appeal from the judgment of this Court heretofore entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which complainants and appellants should give and furnish upon said appeal, and that upon the giving of said security all further proceedings be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals, and that said Court further make an order continuing in force the temporary injunction heretofore granted by said court.

NOW, THEREFORE, IT IS ORDERED that the prayer of said petition be allowed, and that an appeal be and the same is hereby allowed. [134]

IT IS FURTHER ORDERED that, upon the filing with the Clerk of this court by complainants and appellants of a good and sufficient bond in the sum of $1,000, said bond to be approved by the Court, all further proceedings be and they are hereby suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals.

AND IT IS FURTHER ORDERED that the temporary injunction heretofore granted in said cause be and the same hereby is continued in force pending the said appeal and until the final determination thereof.

Dated this 20th day of January, 1930.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Jan. 20, 1930. [135]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that Patrick Walsh & Sons, Inc., a corporation (substituted as complainants in the place and stead of John M. Walsh and Thomas A. Kearney, as trustees), W. M. Kearney, and W. S. Brown, as executor of the last will and testament of Patrick Walsh, deceased (substituted as complainant in the place and stead of Patrick Walsh), as principals, and American Surety Company of New York, a corpo-

ration organized and existing under the laws of the State of New York, and duly authorized to transact business in the State of California, as surety, are held and firmly bound unto Mary C. Hill, Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglas, Hubert W. Hill, Mildred L. Hill, Christine V. DeForest, Maude B. McGregor, Mary C. Hill as Administratrix of the Estate of Thomas Hill, deceased, John Doe, Richard Roe, Sally Moe, First and Sally Moe Second, in the full and just sum of $1,000, to be paid to said defendants, [136] their certain attorneys, executors, administrators, administrators or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

WHEREAS, lately in the Northern Division of the District Court of the United States for the Northern District of California, in a suit depending in said court between the above-named complainants and defendants a judgment was rendered in favor of said defendants and against said complainants, and

WHEREAS, said complainants having obtained from the above-entitled court an order allowing an appeal to reverse the judgment in said cause and a citation directed to said defendants citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the

Ninth Circuit to be holden in the City and County of San Francisco, State of California,—

NOW, THEREFORE, the condition of the above obligation is such, that if the complainants and appellants shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and effect.

IT IS FURTHER STIPULATED as a part of the foregoing bond, that in case of the breach of any condition thereof, the above-named District Court may, upon notice to the surety above named, proceed summarily in said action or suit to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor.

IN WITNESS WHEREOF, we have hereunto set our hands and seals [137] and caused these presents to be executed this 27th day of December, 1929.

W. M. KEARNEY.

AMERICAN SURETY COMPANY OF NEW YORK.

By K. F. WARRACK,
Resident Vice-President.

Attest: E. C. MILLER,
Resident Assistant Secretary.

The foregoing bond is hereby approved this 20th day of Jan., 1930.

FRANK H. KERRIGAN,
District Judge.

State of California,
City and County of San Francisco.

On this 27th day of December, in the year one thousand nine hundred and twenty-nine, before me, John McCallan, a notary public in and for the City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared K. F. Warrack and E. C. Miller, known to me to be the Resident Vice-president and Resident Assistant Secretary respectively of the American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires 4/12/33.

[Endorsed]: Filed Jan. 20, 1930. [138]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in the above-entitled cause to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, incorporating therein the following portions of the record, to wit:

1. Amended complaint.
2. Answer to plaintiff's amended complaint.
3. Memorandum opinion.
4. Order to set aside submission.
5. Order of consolidation.
6. Condensed statement of testimony and evidence.
7. Second memorandum opinion.
8. Decree.
9. Petition for order allowing appeal. [139]
11. Assignment of errors.
12. Order allowing appeal.
13. Bond on appeal with order approving same.
14. Citation on appeal with proof of service.
15. Praecipe for transcript of record.

W. M. KEARNEY,
N. J. BARRY,
EDWARD F. TREADWELL,
Solicitors for Complainants and Appellants.

Due service and receipt of copy of within acknowledged this 24th day of January, 1930.

J. E. PARDEE and
R. M. RANKIN.

[Endorsed]: Filed Jan. 29, 1930. [140]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 140 pages, numbered from 1 to 140, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Patrick Walsh & Sons, Incorporated, etc., et al., vs. Mary C. Hill et al., Equity No. 198, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Sixty-three and 50/100 ($63.50) Dollars, and that the same has been paid to me by the attorneys for appellants herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, this 15th day of February, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [141]

[Title of Court and Cause.]

CITATION.

The President of the United States to Mary C. Hill, Mrs. Sadie Case, Cleve Hill, Joseph Hill, Robert Elmer Hill, Thomas Gay Hill, Lawrence Hill, Jessie I. Hill, Jimmie O. Hill, Florence Hill Douglas, Hubert W. Hill, Mildred L. Hill, Christine V. DeForest, Maude B. McGregor, Mary C. Hill, as Administratrix of the Estate of Thomas Hill, Deceased, John Doe, Richard Roe, Sally Moe First and Sally Moe Second, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City and County of San Francisco, State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal duly made and now on file in the office of the Clerk of the above-entitled court, wherein complainants above named are appellants and you are appellees, to show cause, if any there be, why the judgment rendered against

said appellants, as in the said order allowing the appeal mentioned, should not be corrected and why speedy justice should not [142] be done to the parties in that behalf.

WITNESS the Honorable FRANK H. KERRIGAN, Judge of the United States District Court for the Northern District of California, this 20th day of January, 1930.

FRANK H. KERRIGAN,
District Judge.

Receipt of a copy of the foregoing citation, together with a copy of order allowing appeal and a copy of assignment of errors, is acknowledged this —— day of ————, 1930.

————————————,
————————————,
Solicitors for Defendants and Respondents. [143]

[Endorsed]: Citation. Filed Jan. 20, 1930.

[Title of Court and Cause.]

ADMISSION OF SERVICE OF CITATION.

Due service of citation on appeal in the above-entitled suit is hereby admitted this 24th day of January, 1930.

J. E. PARDEE,
R. M. RANKIN,
Solicitors for Defendants.

[Endorsed]: Filed Jan. 29, 1930. [144]

[Endorsed]: No. 6075. United States Circuit Court of Appeals for the Ninth Circuit. Patrick Walsh & Sons, Inc., a Corporation (Substituted as Complainant in the Place and Stead of John M. Walsh and Thomas A. Kearney, as Trustees), W. M. Kearney and W. S. Brown, as Executor of the Last Will and Testament of Patrick Walsh, Deceased (Substituted as Complainant in the Place and Stead of Patrick Walsh), Appellants, vs. Mary C. Hill et al., Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed February 17, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6076

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, Doing Business Under the Firm Name of TRUMBLE GAS TRAP CO.,

Appellants,

vs.

LORRAINE CORPORATION, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6076

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, Doing Business Under the Firm Name of TRUMBLE GAS TRAP CO.,

Appellants,

vs.

LORRAINE CORPORATION, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Appellants:

Messrs. LYON & LYON, FREDERICK S. LYON, LEONARD S. LYON, HENRY S. RICHMOND, 708 National City Bank Building, Los Angeles, California.

FRANK L. A. GRAHAM, Subway Terminal Building, Los Angeles, California.

For Appellee:

Messrs. WESTALL and WALLACE (JOSEPH F. WALLACE), 1105 Board of Trade Building, Los Angeles, California.

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America, to Lorraine Corporation, a Corporation, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, California, thirty (30) days from and after the date this citation bears date, pursuant to order allowing appeal filed in the Clerk's office of the District Court of the United States for the Southern District of California, Central Division, wherein Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Co., are plaintiffs and you are defendant, to show cause, if any there be, why the order rendered against the said appellants, as in

said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable WM. P. JAMES, Judge of the District Court of the United States for the Southern District of California, this 17 day of January, A. D. 1930.

WM. P. JAMES,
Judge of the District Court of the United States for the Southern District of California.

Service of the foregoing citation by copy acknowledged this 18th day of January, 1930.

LORRAINE CORPORATION.
By WESTALL and WALLACE,
By JOSEPH F. WESTALL,
Its Attorneys. [1*]

Filed Jan. 20, 1930. [2]

In the District Court of the United States, for the Southern District of California, Central Division.

IN EQUITY—No. Q.-38-M.

FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, Doing Business Under the Firm Name of TRUMBLE GAS TRAP CO.,

Plaintiffs,

vs.

LORRAINE CORPORATION, a Corporation,

Defendant.

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*Page-number appearing at the foot of page of original certified Transcript of Record

BILL OF COMPLAINT FOR INFRINGEMENT OF LETTERS PATENT No. 1,269,134.

Now come the plaintiffs in the above-entitled suit and, complaining of the defendant above named, allege:

I.

That plaintiffs, Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, are residents of the county of Los Angeles, State of California, and citizens of said state.

II.

That defendant, Lorraine Corporation, is a corporation organized and existing under the laws of the State of Nevada, and having a regular and established place of business in the county of Los Angeles, within the Southern District of California, Central Division.

III.

That the ground upon which the Court's jurisdiction depends is that this is a suit in equity arising under the patent laws of the United States.

IV.

That heretofore, to wit, on and prior to November 14, 1914, said Milon J. Trumble was the original and first inventor of a certain new and useful invention, to wit, a crude [3] petroleum and gas separator which had not been known or used by others in this country before his invention thereof, nor patented nor described in any printed publication in this or any foreign country before his said invention thereof, or more than two years prior to his

application for a patent, nor was the same in public use or on sale in this country for more than two years prior to his application for a patent in this country and being such inventor, heretofore, to wit, on November 14, 1914, said Milon J. Trumble filed an application in the Patent Office of the United States, praying for the issuance to him of letters patent for said new and useful invention.

V.

That prior to the issuance of any patent thereon, said Milon J. Trumble, for value received, by an instrument in writing, sold and assigned to Francis M. Townsend and Alfred J. Gutzler an undivided interest in and to aforesaid new and useful invention and in and to any and all letters patent that might be issued therefor on said application and in and by said assignment requested the Commissioner of Patents to issue said patent to said Milon J. Trumble, Francis M. Townsend and Alfred J. Gutzler, their heirs, legal representatives and assigns, which said assignment in writing was filed in the Patent Office of the United States prior to the issuance of any letters patent on said application.

VI.

That thereafter, to wit, on June 11, 1918, letters *t*atent of the United States for the said invention dated on said last-named day and numbered 1,269,-134, were issued and [4] delivered by the Government of the United States to the said Milon J. Trumble, Francis M. Townsend and Alfred J. Gutzler, whereby there was granted to Milon J. Trumble, Francis M. Townsend and Alfred J. Gutzler, their

heirs, legal representatives and assigns for the full term of seventeen years from June 11, 1918, the sole and exclusive right to make, use and vend the said invention throughout the United States of America and the territories thereof, and a more particular description of the invention patented in and by said letters patent will more fully appear from the letters patent ready in court to be produced by the plaintiffs.

VII.

That the plaintiffs ever since the issuance of said letters patent have been and now are the sole holders and owners of said letters patent and all rights and privileges by them granted, and have under the firm name of Trumble Gas Trap Co. constructed, made, used and sold apparatus containing and embracing and capable of carrying out the invention patented by the said letters patent and upon each of said apparatus have stamped and printed the day and date of and the number of said letters patent and the same have gone into general use.

VIII.

That on or about the 3d day of January, 1921, plaintiffs, Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler brought their bill in equity in the Southern District of the United States for the Southern District of California against David G. Lorraine and in said suit complained that the defendant had infringed and threatened further infringement of said letters patent No. 1,269,134; that the said defendant filed his answer to the said bill of complaint; that said cause came on to be

heard on the pleadings and proof and was argued before the Honorable Charles E. Wolverton, District Judge, by counsel for the respective parties and briefs filed therein; that on September 26, 1922, a decree was entered for [5] plaintiffs in said suit adjudging said letters patent good and valid in law, particularly as to claims 1, 2, 3 and 4 thereof; that the said plaintiffs, Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler are the rightful owners of United States patent No. 1,269,134, that defendant had infringed upon the said letters patent, and particularly claims 1, 2, 3 and 4 thereof, and ordering, and adjudging that a writ of injunction issue out of and under the seal of said court directed to said defendant and commanding and enjoining said defendant from infringing upon claims 1, 2, 3 and 4 of said letters patent and ordering an accounting of profits and damages by reason of such infringement; that an appeal was taken by the defendant in that case and heard in due course by the United States Court of Appeals for the Ninth Circuit; that said court on June 4, 1923, rendered an opinion affirming the validity of the patent and finding that said patent was infringed by defendant in said suit. Such opinion of the Circuit Court of Appeals of the Ninth Circuit appearing in Vol. 290 Fed. Rep., at page 54. That during the pendency of the said suit the defendant therein David G. Lorraine transferred his then existing business of manufacturing crude petroleum and natural gas separators to the defendant herein Lorraine Corporation which corporation thereupon became the successor to the said David G. Lorraine in the manufacture

of crude petroleum and natural gas separators, and contributed to and participated in the defense of said suit.

IX.

That on or about the 26th day of April, 1926, the defendant herein sought and plaintiff granted a license to defendant Lorraine Corporation, under patent No. 1,269,134, to manufacture, use and sell gas traps of two specific constructions as illustrated and shown in the two drawings attached to and made a part of said license; that a copy of [6] said license so granted to defendant is attached hereto marked Exhibit "A" and made a part hereof. That since the granting of said license on the 26th day of April, 1926, the defendant Lorraine Corporation, has departed from the constructions therein identified and licensed and has made and sold within the Southern District of California and elsewhere without the license or consent of plaintiffs apparatus described, claimed and patented in and by the said letters patent No. 1,269,134 and has infringed upon said letters patent and particularly upon claims 1, 2, 3 and 4 thereof and intends and threatens to continue so to do.

X.

That by reason of the infringement aforesaid plaintiffs have suffered damages and plaintiffs are informed and believe that the defendant has realized profits but the exact amount of such profits and damages is not known to plaintiffs.

XI.

That defendant is now continuing carrying on the said infringement upon said letters patent daily and threatens to continue the same, and unless restrained by this Court will continue the same whereby plaintiffs will suffer great and irreparable injury and damage for which plaintiffs have no plain, speedy or adequate remedy at law.

WHEREFORE plaintiffs pray as follows:

I.

That a final decree be entered in favor of the plaintiffs, Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, and against the defendant, Lorraine Corporation, perpetually enjoining and restraining the said defendant, its agents, servants, attorneys, workmen and employees and each of them, from using the apparatus described, claimed and patented in and by said letters patent No. 1,269,-134, and from making, using or selling the apparatus described, claimed or [7] patented in and by said letters patent and from infringing upon said letters patent or any of the claims thereof, either directly or indirectly or from contributing to any such infringement.

II.

That upon the filing of this bill of complaint, or later on motion, a preliminary injunction be granted to the plaintiffs enjoining and restraining the defendant, Lorraine Corporation, its agents, servants, attorneys, workmen or employees, and each of them, until the further order of this court from using the

apparatus described, claimed and patented in and by said letters patent No. 1,269,134, and from making, using and selling the apparatus described, claimed and patented by said letters patent and from infringing upon said letters patent or any of the claims thereof, either directly or indirectly, or from contributing *from* any such infringement.

III.

That plaintiffs have and recover from the defendant the profits realized by the defendant herein, and the damages suffered by the plaintiffs and by reason of the infringement aforesaid, together with the costs of suit, and such other and further relief as to the Court may seem proper, and in accordance with equity and good conscience.

FRANCIS M. TOWNSEND.
MILON J. TRUMBLE.
ALFRED J. GUTZLER,
By MILON J. TRUMBLE.

LYON & LYON
FREDERICK S. LYON.
LEONARD S. LYON.
HENRY S. RICHMOND.
FRANK L. A. GRAHAM. [8]

State of California,
County of Los Angeles,—ss.

Milon J. Trumble, being first duly sworn, deposes and says: That he is one of the plaintiffs named in the foregoing bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof to be true of his own knowledge, ex-

cept as to matters therein alleged on information and belief, and as to those matters, he believes it to be true.

MILON J. TRUMBLE.

Subscribed and sworn to before me this 12th day of September, 1929.

[Seal] MEYER WEISMAN,
Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles,—ss.

Francis M. Townsend, being first duly sworn, deposes and says: That he is one of the plaintiffs named in the foregoing bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof to be true of his own knowledge, except as to matters therein alleged on information and belief, and as to those matters, he believes it to be true.

FRANCIS M. TOWNSEND.

Subscribed and sworn to before me this 12th day of September, 1929.

[Seal] MEYER WEISMAN,
Notary Public in and for the County of Los Angeles, State of California.

[Indorsed]: Filed Sep. 13, 1929. [9]

EXHIBIT "A."

LICENSE.

WHEREAS, the TRUMBLE GAS TRAP COMPANY, a co-partnership consisting of FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, is the sole and exclusive owner of Letters Patent of the United States, No. 1,269,134, granted on the 11th day of June, 1918, on Crude Petroleum and Natural Gas Separator; and,

WHEREAS, the LORRAINE CORPORATION, a Nevada corporation, is desirous of obtaining a License to manufacture and sell Gas Traps under said Letters Patent.

NOW, THEREFORE, for and in consideration of the sum of Ten ($10.00) Dollars, to it in hand paid and other good and valuable considerations, the receipt of which is hereby acknowledged, the said TRUMBLE GAS TRAP COMPANY, a co-partnership, hereby grants to the LORRAINE CORPORATION, a Nevade corporation, a non-exclusive License to manufacture and sell Gas Traps under Letters Patent No. 1,269,134 in substantial accordance with those two certain drawings attached hereto and made a part hereof, for the life of said Letters Patent and any reissue thereof throughout the United States, free of any royalty for such manufacture and sale.

This License is subject to the condition that all Gas Traps sold by the parties named herein shall be complete units and that neither party named

herein shall sell parts separate and apart from complete units except as repair or replacement for such complete units.

IN WITNESS WHEREOF, the said TRUMBLE GAS TRAP COMPANY has executed this License this 2nd day of April, 1926.

TRUMBLE GAS TRAP COMPANY,
By F. M. TOWNSEND.

R. O. ADAMS.
L. H. CARPENTER. [10]

[Title of Court and Cause—Cause No. Q–38—M.]

ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE.

To Lorraine Corporation, Defendant Above Named:

Upon reading the verified bill of complaint herein, and the affidavits of William McGraw, Ralph Foster, Milon J. Trumble, and John D. Hackstaff, and upon motion of solicitors for plaintiff,—

IT IS HEREBY ORDERED that you, the above-named defendant, show cause before Honorable Wm. P. James, or one of the Judges of this court, at the courtroom of this court in the Postoffice Building in the city of Los Angeles, State of California, on the 23 day of September, 1929, at ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard, why you should not be enjoined and restrained, as prayed in said bill of complaint, during the pendency of this cause.

IT IS FURTHER ORDERED that the hearing for the said temporary injunction be upon affidavit; that a copy of this order to show cause, and a copy of said bill of complaint and [13] copies of the affidavits of William McGraw, Ralph Foster, Milon J. Trumble, and John D. Hackstaff, be served upon the defendant on or before September 14, 1929; and that the defendant serve and file any showing on its behalf herein on or before September 20, 1929.

Dated at Los Angeles, California, this 13 day of September, 1929.

WM. P. JAMES,
United States District Judge.

[Indorsed]: Filed Sep. 13, 1929. [14]

[Title of Court and Cause—Cause No. Q–38—M.]

AFFIDAVIT OF WILLIAM McGRAW.

State of California,
County of Los Angeles,—ss.

William McGraw, being duly sworn, deposes and says as follows:

That he is forty-two years of age and a resident of Los Angeles, County of Los Angeles, State of California; that he is an employee of plaintiffs in this action, as manager of the said company; that prior to such employment he was employed by the Anglo-Saxon Petroleum Company as manager of the refinery at Shellhaven, England, and prior to such employment was superintendent of construction with the Trumble Refining Company; that he was chief engineer of the plaintiffs herein since 1921; that as part of his duties with the said plaintiffs, he has visited the oil fields of the States of California, Texas and Montana, and the Dominion of Canada, and has examined and become familiar with devices used in the oil fields for the separation of natural gas [15] and oil; that his duties with plaintiff included the inspection and servicing of oil and gas separators in operation in the oil fields;

that he has inspected at various times, as herein more particularly set forth, devices made by the defendant herein for the purpose of separating natural gas and oil, hereinafter referred to as oil and gas separators. That of such devices so examined and with which he is familiar, he has prepared a drawing diagrammatically illustrating various constructions of such gas traps manufactured and sold by defendant, which drawing is attached hereto and made a part hereof, and referred to as Exhibit "A."

That in the spring or summer of the year 1928 he inspected a gas trap, manufactured by the defendant herein and delivered to the Casa Blanco Oil Company at Signal Hill, California, which was constructed as shown on the accompanying print marked Exhibit "A" and particularly identified thereon as Figure 1. That this trap was provided with an inlet opening for discharging from the well into the oil and gas separator a mixture of commingled oil and gas, the inlet opening discharging into a baffle or trough, circular in form, formed on the inner wall of the separator shell and welded thereto, which baffle or trough consisted of an upper and lower and an inner side wall extending approximately two-thirds of the distance around the inner wall of the shell, the discharge end of such baffle or trough being open, the upper and inner wall of such baffle extending approximately two or three inches beyond the lower or bottom wall of the baffle.

That shortly after the examination of the oil and gas separator just described and referred to as Figure 1 on the said Exhibit "A," he examined an oil

and gas separator at the shop of the defendant corporation at Compton, California, together with drawings of said separator exhibited to him by David G. Lorraine, which said gas trap was designed in accordance with a diagrammatic illustration of said Exhibit "A," and marked Figure 2. In [16] this trap the mixture of oil and gas was discharged into the separator through the side wall thereof, into a chamber formed between a vertically extending plate or wall and the side wall of the separator. The gas and entrained vapors rising upwardly from said chamber through an elbow into a baffle, which baffle extended around the inner wall of the shell of the separator and comprised upper, inner and lower circular walls, the lower, or bottom, wall of said baffle or trough being spaced apart from the inner wall of the shell, forming a slot for discharge of accumulated oil in the baffle or trough against the inner wall of the said shell over which the same would flow downwardly in a thin film.

That thereafter, on the 20th and 21st days of August, 1928, he, accompanied by W. A. Doble, Sr., John D. Hackstaff and George Prout, examined an oil and gas separator in the yard of the Shell Oil Company at Signal Hill, California, which separator had attached thereto a plate marked "Lorraine Corporation" and bearing Serial No. 5051B. That such trap so examined was constructed as shown in the diagrammatic drawing marked Figure 3 on Exhibit "A" attached hereto, and was provided with an oil and gas inlet for discharging a mixture of oil and gas from the well into a circular baffle or trough arranged on the inside of the shell, which circular

baffle extended approximately three-quarters of the distance around the shell, the top, side wall and bottom wall of such baffle being closed throughout its length, with the exception that the bottom wall of said baffle adjacent to the inner wall of the shell of the trap was provided with a series of openings cut therein, through which the gas and oil delivered into said baffle would be discharged downwardly into the shell of the trap. The slots cut in the bottom wall of the baffle varied in width from three to four inches from the shell, and were of varying lengths. That the oil and gas separator just [17] described is more particularly illustrated in blueprint attached hereto and marked Exhibit "B." That under ordinary field operations the separator just described would operate as follows: The commingled oil and gas delivered into the runaround baffle would be deflected by this runaround baffle, and the heavier particles, consisting of the oil, would be deposited upon the inner wall of the shell of the separator. The oil so deposited on the inner wall of the shell would flow down the shell in a thin film through the slots in the bottom of the runaround baffle and out of the open end of the runaround baffle, thus allowing the gas to escape outwardly from this film of oil when it was so spread on the inner wall of the shell of the separator.

That on or about the 10th day of January, 1929, he examined an oil and gas separator at the property of the Union Oil Company of California, at the location designated as Howard No. 5, which separator bore the name-plate of the defendant herein, "Lorraine Corporation," together with the notation "Se-

rial No. 7095." That the construction of said separator is illustrated diagrammatically and identified as Figure 4 of Exhibit "A" attached hereto, and as shown therein it was provided with an oil and gas inlet opening which discharged a mixture of oil and gas from a wall into a circular baffle or trough arranged on the inside of the shell, which baffle extended approximately the full circular distance of the shell and was spirally arranged so that the discharge end of said baffle was located immediately under the gas and oil inlet to the trap above referred to. That said baffle was closed as to top, inner wall and bottom wall, with the exception that the bottom wall was discontinued approximately three-quarters of the distance around the trap, the bottom from such point to the discharge or open end of the baffle being open.

That on or about the 12th day of August, 1929, this affiant, accompanied by E. H. Adams, examined an oil and gas separator [18] on the property of the Union Oil Company at Santa Fe Springs on the particular location designated as Bell No. 48, such trap bearing the name-plate of the defendant "Lorraine Corporation," together with the notation "Serial No. 7113M." That said trap was constructed as illustrated diagrammatically in Figure 5 of Exhibit "A" attached hereto, and which construction is described as follows:

This gas and oil separator was provided with an oil and gas inlet opening for discharging a mixture of oil and gas from a well into a circular baffle or trough arranged on the inside of the shell of the separator, which circular baffle or trough ex-

tended to a point approximately two-thirds around the inner wall of the shell of the separator in approximately the same horizontal plane as the inlet opening. That from the end or termination of such horizontal portion, the upper wall of the said baffle dipped downwardly around the inner wall of the shell to a point below the baffle at the gas and oil inlet opening. That the top and inner wall of said baffle was closed throughout and that the bottom wall of said baffle was closed throughout the horizontally arranged portion of said baffle. That from the termination of said flat bottom wall a deflector plate was attached to the inner wall and extended downwardly and outwardly therefrom into contact with the inner wall of the shell of the separator, thereby forming a discharge end for the bottom wall of the baffle, which would, in operation, discharge the oil from the baffle against the inner wall of the shell of the separator. That from the end of such deflector plate to the end of the baffle, the said baffle was open at the bottom.

That the oil and gas separator just described is more particularly shown in that certain print attached hereto and marked Exhibit "C."

That on the same day this affiant, accompanied by the said [19] E. H. Adams, also examined an oil and gas separator on the property of the Union Oil Company of California at Santa Fe Springs, California, and on the location designated as Bell No. 49, which said gas separator bore the name-plate of defendant, "Lorraine Corporation," together with the identification "Serial No. 7099M." That said separator so examined was of the same

general construction as that hereinabove described with reference to Figure 5 of Exhibit "A" attached hereto, with the exception that the baffle extended around the inner wall of the shell in a reverse direction to that shown in Figure 5.

That on or about the 22d day of August, 1929, this affiant, accompanied by E. H. Adams, examined an oil and gas separator on the property of the Union Oil Company at Santa Fe Springs, California, on the location more particularly designated as Farwell No. 13. That said separator bore the name-plate of defendant, "Lorraine Corporation," and bore the identification "Serial No. 7115M." That said separator had been in service and was examined by this affiant and said E. H. Adams at about the hour of ten o'clock A. M. on the morning of August 22, 1929, measurements being taken of the construction of the oil and gas inlet, which construction is as shown in Figure 6 of Exhibit "A" attached hereto. That said separator was provided with a gas and oil inlet which discharged into a circular baffle arranged on the inside of the shell, of the same general form and construction as that shown in Figure 5 of said Exhibit "A" and herein above described, with the exception that the deflector plate was angularly disposed, not only from the inner wall of the baffle toward the inner wall of the shell of the separator, but was also diagonally disposed from the termination of the horizontally disposed portion of the bottom plate of the baffle downwardly toward the open end of said baffle. That the said separator was placed in operation on the same day and was observed in service [20]

operation at or about the hour of two o'clock P. M. of said 22d day of August, 1929, by this affiant and said E. H. Adams; and that the pressure indicator mounted thereon indicated a pressure of between thirty-five and forty pounds per square inch.

That the oil and gas separator just described is more particularly shown in a print attached hereto and marked Exhibit "D."

That this affiant again visited the location, Farwell No. 13, above identified, on the 23d day of August, 1929, and photographed the said separator and portions thereof, including particularly the pressure indicator showing the amount of pressure registered thereon. That the photographs just referred to are attached hereto and marked Exhibits "E" and "F."

Affiant states that from his knowledge of oil and gas separators, based upon his experience gained in their manufacture, and from his observation of gas and oil separators in operation, the commingled oil and gas delivered into the gas and oil separators with baffles built in accordance with the description and the drawings shown in Exhibit "A" hereto, Figs. 1, 4, 5 and 6, respectively, would be delivered from the end of the baffle on to the inner wall of the gas and oil separator, and that such oil so delivered on to the inner wall would travel down thereon in a thin film, allowing the gas to escape therefrom outwardly into the center of the separator, and the oil would flow quietly down and mingle with the body of oil in the bottom of the separator. Affiant further states that he has studied and is familiar with patent No. 1,269,134, patented July

11, 1918; that the baffles constructed as shown in Exhibit "A," Figs. 1, 3, 4, 5 and 6, respectively, perform the same function of spreading the oil in a thin film on the inner wall of the separator substantially in the same manner as do the spreading surfaces of the baffles or cones 22 and 22–a of the Trumble patent in suit. [21]

That affiant has examined and is familiar with those certain prints attached to the license agreement granted by the plaintiffs herein to defendant, and attached to the bill of complaint herein and marked Exhibit "A" to said bill of complaint; that the different forms of baffles shown in Exhibit "A" attached to this affidavit, and marked Figs. 1, 2, 3, 4, 5 and 6, respectively, are different in construction from the oil distributing means shown in the prints attached to the said license agreement.

That affiant has caused to be made, under his personal supervision and direction, models in accordance with the forms of construction shown in Exhibit "A" attached hereto, and numbered Figs. 1, 2, 3, 4, 5 and 6, respectively; that said models are marked, respectively, Exhibits "A–1," "A–2," "A–3," "A–4," "A–5" and "A–6," and are filed herewith as exhibits to this affidavit, and by such reference are made a part of this affidavit; that the several model exhibits are made to scale, ¼ size, from measurements and inspection by affiant of standard separators made by defendant.

WM. McGRAW.
WILLIAM McGRAW.

Subscribed and sworn to before me this 12th day of September, 1929.

[Seal] MEYER WEISMAN,

Notary Public in and for the County of Los Angeles, State of California.

[Indorsed]: Filed Sep. 13, 1929. [22]

(Note by CLERK: This same drawing attached to affidavits of Milon J. Trumble, John D. Hackstaff and Ralph Foster as Exhibit "A.")

[Title of Court and Cause—Cause No. Q.-38-M.]

AFFIDAVIT OF RALPH FOSTER.

State of California,
County of Los Angeles,—ss.

Ralph Foster, being first duly sworn, deposes and says: That he is 27 years of age and resides at Long Beach, county of Los Angeles, State of California; that he graduated from the Kansas State Agricultural College in the year 1926 with the degree of mechanical engineer; that he was employed for a period of five months with the C. F. Braum Corporation in the capacity of general workman and finally as inspector of product for foreign trade; that he was employed for a period of one year with the Loomis Oil Well Control Co., in the capacity of designing and field engineer; that since December 1st, 1927, he has been employed by the Shell Company of California at Ventura, California, and Signal Hill, California, as an engineer trainee spending the first six months, of such employment with the Shell Company of California on pipe line work followed by a period of six months in testing crude petroleum and natural gas separators and finally being employed in field work with a well-pulling crew; [29] that during the period of his employment with the Shell Company of California in which he was employed in testing crude petroleum and natural gas separators he tested certain such apparatus manufactured by defendant herein, Lorraine Corporation, made in accordance with types marked Figs. 1, 3 and 4 on that certain print attached

hereto and marked Exhibit "A" as well as modifications of the type marked Fig. 3 on said print Exhibit "A" which were constructed as shown in that certain sketch attached hereto marked Exhibit "B" and that certain print of defendant Lorraine Corporation D–1152 attached hereto marked Exhibit "C"; that with apparatus constructed like Fig. 1 of Exhibit "A" and like Exhibit "B" he observed the interior of such apparatus in operation through peep holes in the side wall of such apparatus and observed that substantially all of the crude petroleum was spread on the inner wall of the shell of the apparatus running downwardly thereover in a thin sheet or film; that in such apparatus of defendant Lorraine Corporation hereinabove designated as Fig. 3 of Exhibit "A" and that constructed like Exhibits "B" and "C" the general construction of the apparatus was substantially the same and that differences consisted in the arrangement, length and width of slots in the lower wall or bottom of the baffle designated on Exhibit "C" as a trough; that in all forms of apparatus constructed with slots or openings in the bottom of the baffle or trough such slots or openings were made in such a manner as to expose an uninterrupted portion of the side wall of the apparatus to receive crude petroleum from the baffle or trough onto such side wall and flow downwardly thereover; that in each construction of crude petroleum and natural gas separator hereinabove referred to oil and gas under pressure is delivered into the baffle or trough and is caused to flow around the baffle or trough against the inner

wall of [30] the apparatus and to be finally delivered to the inner wall of the apparatus over which substantially all of the crude oil flows downwardly in a thin film or sheet without the formation of streams or droplets to the body of oil collected in the bottom of the apparatus.

RALPH FOSTER.

Subscribed and sworn to before me this 3d day of September, 1929.

[Seal] MEYER WEISMAN,

Notary Public in and for the County of Los Angeles, State of California.

[Indorsed]: Filed Sep. 13, 1929. [31]

EXHIBIT "A."

(Same as Exhibit "A" attached to Affidavit of William McGraw.) [32]

[See page 26, Printed Transcript of Record.]

[Title of Court and Cause—Cause No. Q.-38-M.]

AFFIDAVIT OF MILON J. TRUMBLE.

State of California,
County of Los Angeles,—ss.

Milon J. Trumble, being first duly sworn, deposes and says: That he is one of the plaintiffs above named; that he is a resident of the city of Alhambra, county of Los Angeles, State of California; that he is the Milon J. Trumble, patentee of United States letters patent No. 1,269,134, for Crude Petroleum and Natural Gas Separator, issued June 11, 1918, which is the patent in suit; that he has been engaged in the oil business since the year 1903, first beginning as a member of a drilling crew in that year and continuing in the drilling department of the oil industry until 1906, when he became a fireman in the Atlas Refinery located at Vernon, California; that he remained a fireman in this refinery until the year 1907, when he became a stillman, in which capacity he remained until 1910; that in the year 1914 affiant became associated with Francis M. Townsend and Alfred J. Gutzler, the other two plaintiffs above [35] named, in the business of manufacturing and selling gas and oil separators, which business has been since that time conducted under the firm name and style of Trumble Gas Trap Company; that since the organization of said copartnership affiant has had supervision of the manufacture of all gas and oil separators manufactured by said copartnership; that affiant is familiar with the gas and oil separator art, as shown by the patented art and also

by the gas and oil separators used in the oil-fields, particularly the oil-fields of the State of California; that affiant is familiar with United States letters patent No. 1,269,134, the patent here in suit.

That attached hereto, marked Exhibit "C," and made a part of this affidavit, is a print No. D–1152, entitled "B–150, Separator, Lorraine Corporation, Los Angeles, Cal."; that affiant has examined this print and understands the construction and operation of a gas and oil separator made in accordance with said print; that a gas and oil separator made in accordance with the print, Exhibit "C," and placed in operation in connection with an oil-well, would under ordinary field operations operate as follows:

The commingled oil and gas would enter the gas and oil inlet located near the top of the shell of the separator and be discharged into the runaround baffle which is also located near the top of the shell. The commingled oil and gas thus entering the runaround baffle would be deflected by this runaround baffle, and the heavier particles, consisting of the oil, would be deposited upon the inner wall of the shell of the separator. The oil so deposited on the inner wall of the shell would flow down the shell in a thin film through the slots in the bottom of the runaround baffle and out of the open end of the runaround baffle, thus allowing the gas to escape outwardly from this film of oil when it was so spread on the inner wall of [36] the shell of the separator. The film of oil on the inner wall of the separator, after the gas had escaped therefrom, would collect in the bottom of the separator,

the separator being provided with an oil outlet from the collecting chamber for the oil in the bottom of the separator, and the gas separated from the flowing film of oil collecting in the upper portion of the separator being discharged therefrom through a gas take-off means, such gas take-off means and oil outlet being provided with suitable valves operated in synchronism so that a sufficient body of oil is maintained in the collecting chamber in the bottom of the separator to provide submergence of the oil outlet means therefrom. That an oil and gas separator made in accordance with the print attached hereto, and marked Exhibit "C," would under ordinary field conditions operate under pressure, the print showing a pop safety valve at the top of the separator for the purpose of relieving an undue accumulation of pressure in the separator. The function of this runaround baffle is to slow down the velocity of the incoming oil and gas and is the means for spreading the oil in a film on the inner wall of the shell of the separator, in substantially the same manner as do the baffles or cones 22 and 22–a of the Trumble patent in suit.

That attached hereto and marked Exhibit "A," is a blue-print illustrating six different forms or variations of runaround baffles which affiant is informed and believes the defendant, Lorraine Corporation, has embodied in gas and oil separators like that shown in Exhibit "C," and which said defendant has manufactured, sold and used; that is, such separators being provided with an oil and gas inlet from a flowing well which discharges into a baffle of one of the forms shown on Exhibit "A,"

such separators being provided with a collecting chamber for the oil in the bottom of the separator, an oil outlet means in communication with the body of oil, and a gas outlet means at the top of the shell, the oil and gas outlet means [37] being each provided with valves synchronously operated in such a manner as to maintain a pressure in the separator.

Referring to Fig. 1 of Exhibit "A," this figure discloses a runaround baffle, circular in form, with an inlet opening therein. This baffle is formed on the inner wall of the gas and oil separator shell and welded thereto, and consists of an upper, a lower and a side wall extending approximately two-thirds of the distance around the inner wall of the shell, the discharge end of said baffle being open, the upper and inner wall of said baffle extending approximately two or three inches beyond the lower or bottom wall of the baffle.

Referring to Fig. 2, this figure discloses an oil and gas separator in which the mixture of oil and gas from a well is delivered to the inside of the separator into a chamber formed between a vertically extending plate or wall and the wall of the separator, the gas and entrained oil rising from such chamber upwardly through a nipple into a circular baffle arranged above the oil and gas inlet, such circular baffle extending around the inside wall of the separator, and the lower or bottom wall of such circular baffle beyond said vertically extending wall or plate being formed with an annular slot between such bottom wall and the inner wall of the separator whereby accumulated oil in the baffle would be discharged against the inner wall of the separator

and flow downwardly thereover in a thin film, the gas from such circular baffle passing downwardly through said annular slot and upwardly to the top of the trap from which the same was discharged.

Referring to Fig. 3, this figure discloses a circular baffle for receiving the incoming oil and gas, of the same general form and construction as that disclosed in Exhibit "C" hereto. In such form the circular baffle extends approximately [38] three-quarters of the distance around the inside of the shell, the top, side wall and bottom wall of such baffle being closed throughout its length, with the exception that the bottom wall of said baffle adjacent the inner wall of the shell of the separator is provided with a series of openings therein through which the oil delivered into said baffle is discharged against the inner wall of the separator, as hereinabove more specifically described in connection with Exhibit "C."

Referring to Fig. 4, this figure discloses a form of baffle of substantially the same character as that shown in Fig. 1, with the exception that such circular baffle extends entirely around the inner wall of the shell, being helically arranged so that the outlet end of such baffle is directly under the inlet for the oil and gas, the said baffle being closed as to the top, the inner wall and bottom wall, with the exception that the bottom wall is discontinued at a point approximately three-quarters of the distance around the separator from the inlet opening, the bottom from such point to the discharge or open end of the baffle being open.

Referring to Fig. 5, this figure discloses a circu-

lar baffle arranged on the inside of the shell of the separator which circular baffle extends approximately two-thirds around the inner wall of the shell of the separator in substantially the same horizontal plane as the inlet opening; that from the end or termination of such horizontal portion the upper wall of the said baffle dips downwardly around the inner wall of the shell to a point below the baffle at the gas and oil inlet opening; that the top and inner wall of said baffle is closed throughout, and that the bottom wall of said baffle is closed throughout the horizontally arranged portion of said baffle; that from the termination of said horizontal bottom wall a deflector plate is attached to the inner wall of the baffle and [39] extends obliquely downwardly therefrom into contact with the inner wall of the shell of the separator, thereby forming a discharge end for the bottom wall of the baffle; that from the end of such deflector plate to the end of the baffle, said baffle is open at the bottom.

Referring to Fig. 6, this figure discloses a circular baffle arranged on the inside of the shell of the separator of the same general form and construction as that shown in Fig. 5 of Exhibit "A" hereinabove described, with the exception that the deflector plate is angularly disposed not only from the inner wall of the baffle toward the inner wall of the shell of the separator, but is also diagonally disposed from the termination of the horizontally disposed portion of the bottom plate of the baffle downwardly toward the open end of said baffle.

On August 27, 1929, accompanied by William McGraw of Los Angeles, manager of the Trumble Gas

Trap Company, affiant visited the location of Farwell Well No. 13 of the Union Oil Company at Santa Fe Springs, California, and there observed a Lorraine gas and oil separator in operation under pressure. Affiant was informed and believes that such Lorraine gas trap was constructed with a runaround baffle like that shown in Fig. 6 of Exhibit "A" hereto. At said time and place affiant took photographs of said gas and oil separator from two different positions. Prints of such photographs are attached hereto and marked, respectively, Exhibits "E" and "F," and made a part of this affidavit; Exhibit "E" being taken so as to show the entire separator with its attendant connections; Exhibit "F" being a view of only part of the separator to show the pressure gauge and the identifying data on the side of the separator. Such pressure gauge indicated a pressure within the separator varying from 37 to 45 pounds per square inch, indicating that such separator was working under the pressure indicated upon such gauge.

That oil and gas separators manufactured, sold [40] and used by the defendant, Lorraine Corporation, with runaround baffles as disclosed in Figs. 1, 3, 4, 5 and 6 of Exhibit "A," used in ordinary operation in the oil-fields, would operate as follows: The commingled oil and gas would enter the gas and oil inlet located near the top of the shell of the separator and be discharged into the runaround baffle which is also located near the top of the shell. The commingled oil and gas thus entering the runaround baffle would be deflected by this runaround baffle and the heavier particles, consisting of the oil,

would be deposited upon the inner wall of the shell of the separator in a thin film, thus allowing the gas to escape outwardly from this film of oil when it was so spread on the inner wall of the shell of the separator. The film of oil on the inner wall of the separator after the gas had escaped therefrom would collect in the bottom of the separator, and the gas and oil separator would operate in exactly the same manner as described in this affidavit in connection with the oil and gas separator shown in Exhibit "C" attached hereto. That the cross-sectional area of all of these runaround baffles, Figs. 1, 3, 4, 5 and 6, of Exhibit "A," is substantially greater than the cross-sectional area of the inlet opening into said baffle.

Affiant states that the function of these different runaround baffles, as shown in Figs. 1, 3, 4, 5 and 6 of Exhibit "A," as used in connection with the gas and oil separators by the defendant, Lorraine Corporation, is to slow down the velocity of the incoming oil and gas and is the means for spreading the oil in a thin film on the inner wall of the shell of the separator in substantially the same manner as do the baffles or cones 22 and 22–a of the Trumble patent in suit.

Affiant further states that he is familiar with the license agreement entered into by and between the plaintiffs and the defendant, dated April 26, 1926, and attached to and [41] made a part of the bill of complaint on file herein as Exhibit "A," and with the specific forms or constructions of gas and oil separators shown in the drawings attached to and made a part of such license agreement; that by

the terms of such license agreement defendant, Lorraine Corporation, was specifically restricted to the manufacture, sale and use of gas and oil separators made in accordance with the drawings annexed to said license agreement that gas and oil separators manufactured, sold and used by the defendant embodying the structures shown in Figs. 1–6 of Exhibit "A" hereto and in Exhibit "C" hereto are of different constructions from those disclosed in the drawings attached to said license agreement.

MILON J. TRUMBLE.

Subscribed and sworn to before me this 11th day of September, 1929.

[Seal] MEYER WEISMAN,

Notary Public in and for Said County and State.

[Indorsed]: Filed Sep. 13, 1929. [42]

EXHIBIT "A."

(Same as Exhibit "A" attached to affidavit of William McGraw.) [43]

[See page 26, Printed Transcript of Record.]

EXHIBIT "C."

(Same as Exhibit "C" attached to affidavit of Ralph Foster.) [44]

[See page 37, Printed Transcript of Record.]

[Title of Court and Cause—Cause No. Q.-38-M.]

AFFIDAVIT OF JOHN D. HACKSTAFF.

State of California,
County of Los Angeles,—ss.

John D. Hackstaff, being duly sworn, deposes and says: That he is a resident of Los Angeles, California, 51 years of age, and his occupation is consulting engineer, with offices at 520 Chapman Building, Los Angeles, California; that he is a graduate of Stevens Institute of Technology, Hoboken, New Jersey, from which he received a degree in mechanical engineering in 1898, and from that time until the present he has practiced his profession of mechanical engineer; that from 1898 to 1906 he was employed by the Rockwell Engineering Company of New York City, designers and builders of furnaces for manufacturing purposes using oil and gas for fuel; that from 1906 until 1913 he was employed by, and was one of the officers of, the Hope Engineering Company of Pittsburgh, Pennsylvania, designing, contracting and consulting engineers specializing in oil and natural gas installations; that during this time he had charge of the outside construction for this [47] concern, installing gas and oil pipe lines and gas and oil pumping-stations; that in this construction gas and oil separators were employed; that from 1913 to 1915 he was general manager of the Midway Gas Company in Los Angeles, California, and had charge of the production and piping of natural gas from the Midway fields to Los

Angeles, and during that time he installed various types of traps and gas and oil separators; that from 1916 to 1921 he was vice-president and general manager of the Empire Pipe Line Company, building and operating oil and gas pipe lines in the mid-continent fields; that from 1921 to the present date he has resided in Los Angeles and practiced his profession of consulting engineer; that he is, and has been for many years, familiar with various kinds of types of traps and gas and oil separators; that he appeared as a witness on behalf of the plaintiff in the suit of Lorraine Corporation vs. Union Tank & Pipe Company, In Equity.—No. M.-16—J., which cause was tried in the District Court of the United States for the Southern District of California before the Honorable William P. James.

That affiant has studied and is familiar with the gas and oil separator art and with the patents issued by the United States Patent Office for gas and oil separators; that he has studied the Trumble patent No. 1,269,134 and is familiar with the disclosures thereof; that he has visited the oil-fields of the Los Angeles basin and has examined traps manufactured by the Lorraine Corporation, and has observed said Lorraine gas and oil separators in operation in said Los Angeles basin; that on December 20 and 21, 1928, affiant, in company with William A. Doble, of San Francisco, and William McGraw, manager of Trumble Gas Trap Company, examined a gas and oil separator in the yards of the Shell Company at Signal Hill, [48] California; that said gas and oil separator so examined at the yards of the Shell Company at Signal Hill,

California, bore the name-plate of the Lorraine Corporation, Serial No. 5051B; that this oil and gas separator consisted of a cylindrical body or shell arranged to receive oil and gas in the upper portion thereof into a runaround baffle near the top of the shell; this runaround baffle was circular in form and extended approximately three-fourths of the way around the shell, and consisted of a top and bottom and an inner side wall, the top and bottom being welded to the inner wall of the shell; the bottom of this runaround baffle was provided with six slots; these slots were adjacent to the inner wall of the shell and extended from the inner wall of said shell to a distance more than one-half the width of said bottom. These slots comprised in length 48 inches of the 90 inches in length of said bottom of said baffle. Attached hereto, and marked Exhibit "D," is a pencil drawing of said runaround baffle, made under the direct supervision of affiant from data collected and measurements made by affiant on the 20th and 21st days of December, 1928.

Attached hereto and marked Exhibit "C" is a (MW.)
~~blue~~ print of an oil and gas separator of the Lor-
(MW.)
raine Corporation, which ~~blue~~ print shows in detail substantially the construction of the Lorraine gas and oil separator, Serial No. 5051B, examined by affiant at the Shell Company yards at Signal Hill. In the operation of this trap, gas and oil from the well would be delivered into the trap through the inlet D into the interior of the runaround baffle. As the flowing stream of com-

mingled gas and oil would be diverted from a straight path by the curvature of the shell, substantially all of the particles of oil would be deposited upon the interior surface of the shell within the runaround baffle. This film of oil in contact with the shell would run down the inner wall of the shell and pass through the cutout openings in the bottom of the baffle and continue to run down the inner wall of the shell to the collecting chamber in [49] the bottom thereof. As the oil would be deposited on and flow down the shell of the separator, the gas would escape outwardly therefrom, and due to its lighter specific gravity travel to the top of the separator into the gas outlet. By this action substantially all of the oil would be deposited in a film upon the inner wall of the shell within the runaround baffle and would emerge in a film on the inner wall of the shell through the slots in the bottom of the runaround baffle. The oil would be collected in the collecting chamber in the bottom portion of the shell. A steel float was mounted in the oil-collecting chamber, and when the oil had reached a predetermined level would begin to open the oil outlet and synchronously start to close the gas outlet. Both the gas and oil outlet valves were so arranged as to be synchronously and inversely operated by this float; the oil valve closing while the gas valve opened, and the gas valve closing when the oil valve opened. By this method of operation the oil outlet would always be submerged in oil.

Attached hereto, and marked Exhibit "A," is a blue-print showing six types of inlet runaround baffles alleged to have been used in connection with

Lorraine gas and oil separators. On the 29th day of August, 1929, accompanied by Henry S. Richmond and E. H. Adams, affiant examined a gas and oil separator located on the property of the Union Oil Company at Santa Fe Springs, at Bell Well No. 49. This gas and oil separator had attached thereto a brass plate upon which was printed the following:

"Lorraine Automatic
Gas and Oil Separator
Los Angeles, Cal.
Patented April 5, 1921
Nov. 8, 1921
Patents Pending.
Serial No. 7099–M."

This gas and oil separator was built substantially like the gas and oil separator illustrated and shown in Exhibit "C" hereto, with the exception that it had a runaround baffle installed [50] therein like that shown in Fig. 6 of Exhibit "A" hereto. The runaround baffle in this oil and gas separator No. 7099–M was circular in form; the top and inner wall thereof extended around the entire circumference of the shell, the discharge end of the top of the runaround baffle being welded to the bottom of the inlet casting of the runaround baffle. The bottom of this runaround baffle was circular in form and extended substantially parallel with the top for two-thirds of the distance around the shell. From this point the bottom of the runaround baffle was bent downward into a position oblique and directed toward the inner wall of the shell, and the edge that

was welded to the inner wall of the shell was lowered until the bottom of the baffle met the inner wall of the shell at an inclined angle of approximately 30 degrees, the point at which this inclined part of the bottom of the baffle terminated being approximately three-fourths of the way around the shell from the gas and oil inlet; the remainder of the bottom of the baffle being open; the top, inner wall and bottom of the baffle just described was welded together, and the top and bottom thereof securely welded to the inner wall of the shell; the only outlet to this baffle being at the end thereof at the termination of the bottom, which was at a point approximately three-fourths of the way around the shell from the gas and oil inlet.

In operation of this gas and oil separator, Serial No. 7099–M., just described, the oil and gas from the well would be delivered into the oil and gas inlet and would be discharged into the runaround baffle just described, and substantially all the oil particles would be delivered on to the inner wall of the trap, where they would spread out into a film from which the gas would be free to escape into the center of the shell, from whence the gas would be free to rise to the top of the shell and pass out of the gas outlet; and the operation of the gas and oil separater just described would be the same [51] as that described in connection with Exhibits "C" and "D" hereto.

Affiant further states that he has examined Exhibit "A" hereto and understands the construction of the runaround baffles shown in said exhibit. Referring to Fig. 1 of Exhibit "A," this figure dis-

closes a runaround baffle, circular in form, with an inlet opening therein. This baffle is formed on the inner wall of the gas and oil separator shell and welded thereto, and consists of an upper and lower and a side wall extending approximately two-thirds of the distance around the inner wall of the shell, the discharge end of said baffle being open, the upper and inner wall of said baffle extending approximately two or three inches beyond the lower or bottom wall of the baffle.

Fig. 3, as shown in Exhibit "A," is of the same type of runaround baffle as affiant described and explained in his description of Lorraine gas and oil separator, Serial No. 5051–B, above.

Fig. 4 of said Exhibit "A" illustrates a runaround baffle with an oil and gas inlet opening therein. This baffle extends approximately the full circumference of the shell and is helically arranged so that the discharge end of said baffle is located immediately under the gas and oil inlet above referred to. This baffle is closed as to the top and inner wall, and the bottom wall terminates at a point approximately three-quarters of the distance around the trap from the gas and oil inlet.

The runaround baffle illustrated in Fig. 5 is the same as that shown in Fig. 6 and described and explained by affiant in connection with Lorraine gas and oil separator, Serial No. 7099–M, with the exception that the oblique portion of the bottom of the runaround baffle is constructed in two pieces, and the major portion of the oblique bottom meets the inner wall of the shell in a plane perpendicular to the axis of the cylindrical [52] shell instead

of at an angle thereto. In operation a trap constructed with a runaround baffle like Fig. 5 would operate the same as that illustrated in Fig. 6 of Exhibit "A" and like Lorraine gas and oil separator, Serial No. 7099–M, by delivering substantially all of the oil onto the inner wall of the shell in a thin film, allowing the gas to escape therefrom, said oil flowing down the side of said shell into the body of oil below in a thin film, and not in drops and streamlets.

Referring specifically to the runaround baffles illustrated in Figs. 1, 3, 4, 5 and 6 of Exhibit "A" hereto, the cross-sectional area of such runaround baffle is substantially greater than the cross-sectional area of the inlet opening into said baffles.

Affiant states that a Lorraine gas and oil separator made in accordance with the print, Exhibit "C" to this affidavit, and embodying any of the runaround baffles like those shown in Figs. 1, 3, 4, 5 and 6 of Exhibit "A" hereto, would under ordinary field operations operate as follows: The commingled oil and gas would enter the oil and gas inlet located near the top of the shell of the separator and be discharged into the runaround baffle, which is also located near the top of the shell. The runaround baffle being substantially larger in cross-sectional area than that of the inlet opening, the velocity of the commingled oil and gas would be decreased in its travel through the runaround baffle. The commingled oil and gas thus entering the runaround baffle would be deflected by this runaround baffle, and the heavier particles, consisting of the oil, would be deposited upon the inner wall of the

shell of the separator. The oil so deposited on the inner wall of the shell would flow down the shell in a thin film, thus allowing the gas to escape therefrom toward the center of the separator. The film of oil on the inner wall of the separator, after the gas has escaped therefrom, would collect in the bottom of the [53] separator, the separator being provided with an oil outlet from the collecting chamber for the oil in the bottom of the separator, and the gas separated from the flowing film of oil would be discharged from the top of the separator through a gas take-off means, such gas take-off means and oil outlet being provided with suitable valves operating in synchronism so that a sufficient body of oil is maintained in the collecting chamber in the bottom of the separator to provide submergence of the oil outlet means. That the oil and gas separators manufactured and sold by the defendant, Lorraine Corporation, under ordinary field conditions operate under pressure, all of such separators being provided with a pop safety-valve on such separators for the purpose of relieving an undue accumulation of pressure in such separators.

Affiant further states that he has read the Trumble Patent No. 1,269,134 in suit and is familiar with the same; that the function of these runaround baffles, as illustrated in Exhibit "A" hereto, Figs. 1, 3, 4, 5 and 6, is to slow down the velocity of the incoming oil and gas and is the means for spreading the oil in a thin film on the inner wall of the shell of the separator in substantially the same manner

as do the baffles or cones 22 and 22–a of the Trumble patent in suit.

JOHN D. HACKSTAFF.

Subscribed and sworn to before me this 12th day of September, 1929.

[Seal] MEYER WEISMAN,

Notary Public in and for the County of Los Angeles, State of California.

[Indorsed]: Filed Sep. 13, 1929. [54]

EXHIBIT "A."

(Same as Exhibit "A" attached to Affidavit of William McGraw.) [55]

[See page 26, Printed Transcript of Record.]

EXHIBIT "C."

(Same as Exhibit "C" attached to Affidavit of Ralph Foster.) [56]

[See page 37, Printed Transcript of Record.]

[Title of Court and Cause—Cause No. Q.-38-M.]

ANSWER TO BILL OF COMPLAINT.

Now comes the defendant in the above-entitled cause and for answer unto the bill of complaint,—

I.

Admits that plaintiffs, Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, are residents of the county of Los Angeles, State of California, and citizens of said state.

II.

Admits that defendant, Lorraine Corporation, is a corporation organized and existing under the laws of the State of Nevada, and has a regular and established place of business in the county of Los Angeles, within the Southern District of California, Central Division.

III.

Admits that the ground upon which the court's jurisdiction depends is that this is a suit in equity arising under the patent laws of the United States. [58]

IV.

Denies that heretofore, to wit, on and prior to November 14, 1914, or at any other time or at all, said Milon *T.* Trumble was the original and first or any inventor of a certain new and useful invention, to wit, a crude petroleum and natural gas separator, and denies there was any invention in such device and denies that the same had not been known or used by others in this country before

his alleged invention thereof, and denies that the same had not been patented nor described in any printed publication in this or any foreign country before his said invention thereof, or more than two years prior to his application for a patent, and denies that the same was not in public use or on sale in this country for more than two years prior to his application for a patent in this country, but admits that heretofore, to wit, on November 14, 1914, Milon J. Trumble filed an application in the United States Patent Office praying for the issuance to him of letters patent for said alleged new and useful invention.

V.

Alleges that this defendant is without knowledge as to whether or not prior to the issuance of any patent on the aforesaid alleged invention said Milon J. Trumble for value received, or at all by an instrument in writing or otherwise sold and assigned to Francis M. Townsend and Alfred J. Gutzler an undivided interest in and to the alleged aforesaid new and useful invention and in and to any and all letters patent that might be issued therefor on any such application and in and by said assignment requested the Commissioner of Patents to issue said patent to the said Milon J. Trumble, Francis M. Townsend and Alfred J. Gutzler, their heirs, legal representatives and assigns, and being without such knowledge on such ground denies each and every of said allegations contained in Paragraph V of said complaint, and for want of knowledge also denies that any such

alleged assignment in writing was [59] filed in the Patent Office of the United States prior to the issuance of any alleged letters patent on said application.

VI.

Alleges that this defendant is without information and upon such ground denies that thereafter, to wit, on June 11, 1918, or *at other* time or at all, letters patent of the United States for said alleged invention, dated on said last-named day and numbered 1,269,134, were issued and delivered by the Government of the United States to the said Milon J Trumble, Francis M. Townsend and Alfred J. Gutzler, and upon the same ground denies that any sole and exclusive right whatsoever to make, use, and vend the said invention throughout the United States of America and the territories thereof, was granted or issued and this defendant demands *oyer* of said alleged letters patent as proffered in Paragraph VI of said complaint.

VII.

Alleges that this defendant is without knowledge and therefore denies on such ground that plaintiffs ever since the issuance of said letters patent or at all have been and are now the sole holders and owners of said alleged letters patent and all or any rights and privileges alleged to be granted by them, and upon the same ground and upon want of knowledge also denies that said plaintiffs under the firm name of Trumble Gas Trap Company, constructed, made, used and sold apparatus containing and embracing and capable of carry-

ing out the invention patented by the said letters patent, and upon each of said apparatus have stamped and printed the day and date of and the number of said letters patent and the same have gone into general use, and denies that any such marking as alleged in Paragraph VII of the complaint would be a sufficient marking under the law to give constructive notice to this defendant of the grant and issuance of any such alleged letters patent, and this defendant alleges that plaintiffs have [60] departed from and do not use the alleged invention described in any such pretended letters patent, and that the same is of no utility whatsoever.

VIII.

Admits that on or about the 3d day of January, 1921, plaintiffs, Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler brought their bill in equity in the Southern District of the United States for the Southern District of California against David G. Lorraine, and in said suit complained that said defendant had infringed and threatened further infringement of said letters patent No. 1,269,124; that the said defendant filed his answer to said bill of complaint; that said cause came on to be heard on the pleadings and proof and was argued before the Honorable Charles E. Wolverton, District Judge, by counsel for the respective parties, and briefs filed therein; admits that on September 26, 1922, a decree was entered for plaintiffs in said suit adjudging said letters patent good and valid in law, particularly as to claims 1, 2, 3,

and 4 thereof; and that said plaintiffs Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler were the rightful owners of alleged United States letters patent No. 1,269,134; that defendant had infringed upon said letters patent, and particularly claims 1, 2, 3, and 4 thereof, and ordering, and adjudging that a writ of injunction issue out of and under the seal of said Court directed to said defendant and commanding and enjoining said defendant from infringing upon claims 1, 2, 3, and 4 of said letters patent and ordering an accounting of profits and damages by reason of such infringement; admits that an appeal was taken by the defendant in that case and that the same was heard in due course by the United States Circuit Court of Appeals for the Ninth Circuit; and that on June 4, 1923, said court rendered an opinion affirming the validity of the alleged patent and finding that [61] said patent was infringed by defendant in said suit and that such opinion of the Circuit Court of Appeals *of* the Ninth Circuit appears in Vol. 290 Fed. Rep., at page 54.

Admits that during the pendency of said suit the defendant therein David G. Lorraine transferred his then existing business in the manufacture of crude petroleum and natural gas separators to the defendant herein Lorraine Corporation, which corporation thereupon became the successor to the said David G. Lorraine in the manufacture of crude petroleum and natural gas separators, and continued to and participated in the defense of said suit; but this defendant denies that such decree of Judge Wolverton referred to in Para-

graph VIII of said complaint and above in this answer was affirmed by said Circuit Court of Appeals; but alleges on the contrary that said decree was reversed and alleges that said claims upon such reversal in said opinion were so narrowly construed that only a single separator (referred to in said opinion as Tonner No. 3 Trap) was found to be an infringement of said claims or any of them; and defendant further alleges that it appeared in the record in said cause that there was only a single one of such Tonner No. 3 Traps made and that was made experimentally and was found to be a failure and was without any use thereupon abandoned and consequently that there was no profit or damages derived by said defendant from its experimental use. And this defendant alleges further that such interpretation rendered said patent of practically no value whatsoever and that the same as so construed is void for want of utility, but this matter had never been brought to the attention of the Court of Appeals during the trial of that cause in any adequate manner. Defendant further alleges that thereafter on contempt proceedings in this court said claims were further narrowed and held not to apply to a device which was then the commercial form of separator used by said defendant. [62]

IX.

Denies that on or about the 26th day of April, 1926, the defendant herein sought and plaintiff granted a license to defendant under said patent 1,269,134, as set forth in paragraph IX of the com-

plaint but admits that on or about the 2d day of April, 1926, plaintiff granted a license to this defendant under said letters patent, to manufacture, use, and sell gas traps of a certain specific construction as illustrated and shown in certain drawings attached to and made part of said license; denies specifically that the defendant ever sought such a license and alleges that the subject matter to manufacture, use and sell, which said license covered, had been prior thereto adjudicated by this court by the Honorable Benjamin F. Bledsoe, as Judge thereof, not to be an infringement of said letters patent even as the same were broadly construed prior to the decision of Judge Wolverton hereinbefore referred to; and defendant alleges that there was no consideration whatsoever for said license and that the same was for want of consideration wholly void and of no legal effect; and defendant further alleges that the forms of trap illustrated in the drawings attached to said license, were in in the light of the decision by the Circuit Court of Appeals hereinbefore referred to, clearly non-infringements of any of the claims of said letters patent.

X.

Denies that by reason of any infringement as alleged in Paragraph X of the complaint, plaintiffs or any of them have suffered damages and that defendant has realized profits and defendant denies that there has been any infringement whatsoever of said letters patent. [63]

XI.

Denies that defendant is now or was at the time of the filing of the bill of complaint carrying on any such alleged infringement as referred to in Paragraph XI of said complaint and denies that defendant threatens to continue to infringe and alleges on the contrary that defendant's separators charged to infringe employ an entirely different mode of operation and principle of separation from that forming the alleged essence of invention of said Trumble patent in suit and denies that plaintiffs have cause for complaint whatsoever.

XII.

And for a separate affirmative defense, defendant,—

Alleges that each and every part, means, or elements, as well as the use, function, and effect thereof (both singly and in divers substantially similar associations of means, apparatus, and processes) of the subject matter described in each and every of the claims of said letters patent number 1,269,134, were, long prior to the alleged invention thereof by the said Milon J. Trumble, matters of common knowledge among those skilled in the art of crude petroleum and natural gas separators (as shown particularly by the letters patent and printed publications hereinafter in this complaint referred to), and that by reason of such general common knowledge the conception, description, and production of the subject matter described in each and every of the claims thereof and particularly claims 1 to 4 inclusive of said letters patent

did not require or involve the exercise of the inventive faculty, and that said letters patent and each and every of the claims thereof and particularly claims 1 to 4 inclusive of said letters patent are null and void for want of invention. [64]

XIII.

And for a further separate and affirmative defense, defendant,—

Alleges that the subject matter of each and every of the claims and particularly claims 1 to 4 inclusive of said letters patent number 1,269,134, was not novel at the time of the alleged invention, but that, on the contrary, the same has been patented or described in the following letters patent of the United States, being printed publications, prior to the alleged invention and discovery by the said Milon J. Trumble or more than two years prior to his application for a patent therefor;

Name of Patentee.	Number.	Date Granted.
Bray, E. V.	1,014,943,	Jan. 16, 1912,
Barker, A. W.	927,476,	July 13, 1909,
Bougher, J. S.	535,611,	Mar. 12, 1895,
Branch, J. G.	724,254,	Mar. 31, 1903,
Brown, L. W.	968,534,	Aug. 30, 1910,
Cooper, A. S.	815,407,	Mar. 20, 1906,
Gullinan, J. S.	611,314,	Sept. 27, 1898,
Fisher, Chas. E.	1,182,873,	May 9, 1916,
Gray, J. L.	933,976,	Sept. 14, 1909,
Huxley, C. E.	796,429,	Aug. 8, 1905,
McIntosh, G. L.	1,055,549,	Mar. 11, 1913,
Moore, W.	428,399,	May 20, 1890,
Manning, C. E.	445,472,	Jan. 27, 1891,

Name of Patentee.	Number.	Date Granted.
Newbold & Lowry,	689,366,	Dec. 17, 1901,
Newman,	856,088,	June 4, 1907,
Reynolds, W. H.	663,099,	Dec. 4, 1900,
Senter, J. F.	856,549,	June 11, 1907,
Strohbach, F.	1,095,478,	May 5, 1914,
Simpson, W. L.	395,185,	Dec. 25, 1888,
Schlieper, J. E.	768,628,	Aug. 30, 1904,
Shetter, E. P.	249,487,	Nov. 15, 1881,
Saybolt, G. M.	989,927,	Apr. 18, 1911,
Taylor, W. A.	426,880,	Apr. 29, 1890,

[65]

—the specifications and drawings of each of which said letters patent were offered and received in evidence in the cause re*fered* to in paragraph VIII of the complaint herein, on a hearing on the 21st day of December, 1922, of plaintiffs' motion that defendant therein be punished for contempt for alleged violation of an injunction theretofore entered by this court (Judge Wolverton) (of which alleged contempt this defendant was thereafter purged), of which, being already in evidence in said cause, (upon which motion for preliminary injunction herein is largely based), this defendant requests the Court to take judicial notice. And defendant believes, and therefore alleges on information and belief that the same has also been patented and described at the time last aforesaid in various other letters patent or printed publications, the names of which patentees and the dates of their patents and when granted, and the particulars concerning such publications this defendant

has not sufficient information to set forth at the time of filing this answer but which he prays leave to insert by way of amendment when the same shall have been discovered.

XIV.

As a further separate affirmative defense defendant,—

Further alleges that the said letters patent #1,269,134, are wholly void and without legal effect, for the reason that the said Milon J. Trumble surreptitiously or unjustly obtained the same for that which was in fact invented by another, namely, by Charles E. Fisher, who was using reasonable diligence in adapting and perfecting the same, and who on the 20th day of November, 1913, approximately a year prior to the pretended invention thereof by the said Milon J. Trumble filed his application for United States letters patent in the United States Patent Office fully disclosing the same and to whom, upon such application letters patent of the United States, Number 1,182,873, were, [66] on the 9th day of May, 1916, granted to the said Charles E. Fisher, evidence concerning which defendant, having heretofore filed and offered in evidence on the 21st day of December, 1922, on the hearing of plaintiffs' motion that defendant in said cause be punished for contempt for alleged violation of the injunction of this court (and of which alleged contempt this defendant was thereafter purged) and which, being already in evidence in

the cause (upon which motion for preliminary injunction herein is based), this defendant requests the Court to take judicial notice.

XV.

As a further separate and affirmative defense defendant,—

Alleges that the question of whether or not defendant's form of trap illustrated in the drawings attached to said alleged license agreement constitutes an infringement of any of the claims of said letters patent, 1,269,134, has been passed upon and adjudicated in proceedings in this court in cause No. E.–113—Equity, Townsend et al. vs. David G. Lorraine, in which proceedings said defendant in said last-mentioned cause was charged with contempt for violating the injunction theretofore granted, the hearing of which contempt proceedings was had in this court on the 21st day of December, 1922, before the Honorable Benjamin F. Bledsoe, then Judge of this court, and upon which hearing said defendant was thereafter purged of such charge of contempt and said model of gas and oil separator, such as illustrated in the drawings attached to said license agreement, was found not to be an infringement of any of the claims of said letters patent; and that any charge of infringement based upon the assumed infringement by the subject matter covered by said license agreement is *res adjudicata.*

WHEREFORE defendant prays that plaintiffs' bill of complaint be dismissed and that this defend-

ant have judgment [67] against plaintiffs for its costs and disbursements herein.

LORRAINE CORPORATION.
By DAVID G. LORRAINE,
President.

WESTALL and WALLACE,
(ERNEST L. WALLACE and JOSEPH F. WESTALL),
By JOSEPH F. WESTALL,
Solicitors and of Counsel for Defendant.

State of California,
County of Los Angeles,—ss.

David G. Lorraine, being first duly sworn deposes and says, that he is president of defendant Lorraine Corporation and is familiar with all facts and circumstances set forth in the foregoing answer, and that he has read the same and that the same is true of his own knowledge, except as to matters therein stated to be upon information and belief and to those matters he believes it to be true.

DAVID G. LORRAINE.

Subscribed and sworn to before me this 2d day of October, 1929.

[Seal] MARGARET FEENEY,
Notary Public in and for the State of California, County of Los Angeles.

My Commission expires July 2/33.

[Endorsed]: Filed Oct. 2, 1929.

Received copy of the within answer this 2d day of October, 1929.

LYON & LYON,
HENRY S. RICHMOND,
Attorneys for Plaintiffs. [68]

[Title of Court and Cause—Cause No. Q.–38–M.]

NOTICE OF EVIDENCE RELIED UPON IN RESPONSE TO ORDER TO SHOW CAUSE WHY INJUNCTION SHOULD NOT ISSUE.

To the Above-named Plaintiffs, and to Frederick S. Lyon, Leonard S. Lyon, Henry S. Richmond, and Frank L. A. Graham, Their Attorneys:

You and each of you will please take notice that in response to the order to show cause why preliminary injunction should not issue in the above-entitled cause, the hearing of which has heretofore been set by stipulation and order of Court on the 7th day of October, 1929, defendant files contemporaneously with this notice and will rely upon, their verified answer to the bill of complaint, and the affidavits of David G. Lorraine, E. P. Shaw, and T. D. Boyce, and shall also call to the attention and rely upon the files, records, exhibits and proceedings in Cause No. E.–113—Equity, Townsend et al. vs. David G. Lorraine, and upon the files, records, and proceedings in said last-mentioned cause on appeal being No. 3945 in the United States Circuit Court of Appeals and particularly upon the proceedings in said cause E.–113—Equity in which it

was sought to punish the defendant therein for contempt in the manufacture and sale of said defendant's Model 16 trap, and shall particularly call to the attention of [69] the Court the opinions and decrees entered in all of said proceedings.

Dated this 1st day of October, 1929.

WESTALL and WALLACE,
(JOSEPH F. WESTALL and ERNEST L. WALLACE),
By JOSEPH F. WESTALL,
Solicitors and of Counsel for Defendant. [70]

[Title of Court and Cause—Cause No. Q.-38-M.]

AFFIDAVIT OF DAVID G. LORRAINE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION.

State of California,
County of Los Angeles,—ss.

David G. Lorraine, being first duly sworn, deposes and says: I am president of the defendant Lorraine Corporation and have been such since the date of its incorporation in May, 1923. Defendant company was incorporated to take over an extensive business in the manufacture and sale of oil and gas separators of the general kind involved in this controversy, which I had, prior to that time, built up. Since such incorporation, I have had full control of the design of gas and oil separators made and sold by defendant, and I am consequently quite familiar

with the details of their construction as well as with their mode of operation.

My active study of the separation of oil and gas and of devices for such purposes began fourteen or fifteen years ago, and for many years preceding the filing of the complaint in this cause I have devoted my time almost exclusively to the endeavor to secure the highest degree of excellence in gas traps for such separation. [71]

As part of such labor I have made a careful and very exhaustive study of every patent granted on oil and gas separators and have expended many thousands of dollars in experimenting with various forms of such devices. I have also built and tried out extensively many different designs of such devices. As a result of such study I have from time to time made what I believed to be important discoveries in the art and have covered the same by letters patent. Among the most important of these patents granted to me are the following:

1,373,664, granted April 5, 1921, and its reissue No. 15,220, granted Novem. 8, 1921;
1,396,860, granted November 15, 1921;
1,577,917, granted March 23, 1926;
1,620,771, granted March 15, 1927.

As an important part of this experience I have observed the operation of gas traps in every oil-field in the United States constantly making changes in the design of my said product to meet conditions in the various fields throughout the world and constantly experimenting with various forms and modifications of my trap in order to determine the best manner of producing a product which would be of

universal application. By such study, observation and experimentation I have been able to maintain the rank of defendant company as one of the most important distributors of oil and gas separators in the world. At the present time the Lorraine Corporation sells on an average approximately $67,000.00 worth of gas traps per month. The prices of such traps range from $450.00 to $2,350.00 each.

At some slight preliminary indication of the value of my contributions to this art and to the lack of value of that of the Trumble patent in suit, it is a fact that plaintiffs pay to the Lorraine Corporation, and have paid for several years a substantial royalty for a license under my patents, while neither [72] I nor the defendant company have ever paid to plaintiffs any royalty whatsoever for any license under the patent in suit. It is true that plaintiffs granted to the Lorraine Corporation a license under the Trumble patent in suit, which license is set forth as an exhibit to the bill of complaint herein, but such license was granted, after this court, through Judge Bledsoe, had, on contempt proceedings, adjudicated that the design of trap illustrated in the drawings attached to said license and to which said license was limited, was not within the scope of the Trumble patent in suit, and was not an infringement thereof. The license was granted by plaintiffs without any consideration whatsoever and solely as a device or scheme or means for making it appear to third parties that there was some practicable scope to the Trumble patent in suit, and that it contained certain features of practical value, while the fact was that such patent had been construed in such decisions on contempt and by the

Circuit Court of Appeals to be so narrow as to be worthless in preserving any monopoly or covering any principle of operation that was at all worth covering.

Having been through extensive and expensive litigation respecting the patent in suit I am especially familiar with it, and what is more important I am thoroughly conversant with the manner in which such patent was construed in the various decisions of this court and the Court of Appeals respecting it.

I also know precisely from numerous experiments of various kinds, which have cost me a great deal of money, just exactly how the combined oil and gas will behave inside the separator not only of the Trumble design of trap but of all others, and particularly those involved in the present proceeding.

There were five forms of traps charged to be infringements of the Trumble patent in suit in such former litigation. Only one of these forms was found to be an infringement, the remainder were expressly adjudicated not to be infringements; and [73] from these specific findings and the clear language of the Court's opinion accompanying them, the scope of the Trumble patent has been made clear beyond any possibility of real or substantial controversy.

In order that the Court may clearly and distinctly visualize what has heretofore been found by the Courts not to be infringements of the Trumble patent, I set forth below very clear illustrations. These are accurate in all respects. [74]

As indicated by the labelling of the foregoing illustrations, Model 1 correctly illustrates the construction shown and described in my patent reissue 15,220, and the illustrations following that just above referred to of Model 2 respectively show the trap as it was usually put out, namely, with the—L—connection (designated by the numeral 4 on said illustration erroneously referred to in prior proceedings as a "nipple") in about the center of the oil receiving chamber and the next illustration showing the same alleged "nipple" machined off so as to fit tightly against the partition forming one wall of the oil receiving chamber. It is important to note that each of these drawings are made to scale, and correctly in every respect illustrate the constructions in question, being copies of similar illustrations which were contained in the brief on my behalf before the United States Circuit Court of Appeals, the complete accuracy of which was never questioned.

Subsequent to the decision of the trial court (Judge Wolverton) (afterwards reversed as aforesaid, by the Court of Appeals), I caused the construction of my traps to be changed and got out what was known as Model 16 trap which is fully illustrated in the proceedings on contempt and a model of which will be produced to this affidavit on the hearing of plaintiffs' motion for injunction. [78]

There were thus four types of traps strenuously contended in prior proceedings to be infringements of the Trumble patent which have been fully ad-

judicated not to be infringements, namely, the device of my reissued patent 15,220 (referred to in the opinion of Judge Wolverton as Model 1). The two forms of Model 2 above illustrated, one with a nipple machined off to fit tightly against the partition and lastly Model 16 trap.

There was only one form of separator which was found to be an infringement in any prior litigation. The following illustration is a correct drawing, also made to scale, of the only form of separator found

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to be an infringement of the Trumble patent in suit. This is referred to in the Circuit Court of Appeals' opinion, as Towner No. 3 Trap (correct name as shown by the record is Tonner). [79]

It is difficult to draw the line that separates the finding of noninfringement by the construction of my reissue letters patent 15,220, and the finding of infringement by Tonner No. 3 Trap. The only possible explanation is that the Court believed that in Tonner No. 3 the oil was not splashed but was spread in a thin film over an extended surface down which it flowed. The Court doubtless found in the case of my patent construction, of reissue patent 15,220, that the oil was splashed about and that some of it, although possibly only a small portion, fell to the bottom of the separator in drops or streams, and was not entirely spread out in a thin film, or was spread in a thick uneven layer on the wall of the separator.

I am of course quite familiar with the forms of separators referred to in the affidavit of William McGraw and illustrated in Figs. 1 to 6 of Exhibit "A" to such affidavit. The descriptions of these traps as contained in such affidavit and the illustrations referred to, appear to me to be substantially correct illustrations of traps I have made at about the times and before the times alleged in such affidavit. The explanation as to the mode of operation and the disposition of the mixed oil and gas when it reaches the trap as contained in the McGraw affidavit, is most emphatically erroneous as I am prepared and will be prepared to demonstrate. I have prepared models showing more fully the devices attempted to be illustrated in said Exhibit "A" to the McGraw affidavit, and will present them with this affidavit on the hearing of the order to show cause. All of these alleged infringing traps

referred to in the McGraw affidavit are much further removed from similarity in principle or operation and from being possible infringements of the Trumble patent in suit than those before the Circuit Court of Appeals and before Judge Bledsoe which were expressly found not to infringe. Contrary to the statements contained in said affidavit of William McGraw, in none of [81] such traps (Figs. 1 to 6, inclusive, Exhibit "A," McGraw affidavit) is the oil spread in any thin film on any surface. Some of the oil undoubtedly strikes the vertical wall of the separator in a manner similar to many forms of traps of the prior art but a portion of it will fall to the bottom of the separator without striking the wall and furtherfore that which does strike the wall will not be spread out in a thin film but will flow down the wall in irregular heavy streams; in other words will act exactly as does the oil in the models founds by the Circuit Court of Appeals and Judge Bledsoe not to constitute infringements of the Trumble patent in suit. I believe that such fact will be obvious upon inspection, but if the Court is in any manner in doubt, inasmuch as the matter is of very great importance to me and I will be irreparably injured in my goodwill in the sale of traps if the Court should grant the present motion, I shall be glad to go to whatever expense may be necessary to thoroughly demonstrate to the Court or to a commissioner appointed by the Court, that in none of the alleged infringing traps now before the Court, does the oil spread out in a thin film as limited in the Trumble patent in suit.

What the Court of Appeals said in the opinion reversing Judge Wolverton in the case of E.–113—Equity, reported 290 Federal, page 54, in differentiating the device found not to be an infringement by such decision, is obviously equally true of the traps alleged to be infringements on the present motion, namely, Figs. 1 to 6 inclusive of Exhibit "A" of the affidavit of William McGraw. The Court said (top of page 56, 290 Fed.):

> "While appellant employs a similar chamber or compression tank together with the element of pressure in the tank, the crude mixture is introduced with greater force than in the Trumble device, and instead of gravitating evenly over the conical spreaders and from them down the chamber walls, the incoming stream is broken up by the inclined bottom or deflecting plate of the patent model, or the bell-shaped nipple, and in part splashed against the chamber wall and partition, the other part falling free into the settling pool. Some of the portion striking the partition-plate and chamber [82] walls doubtless flows down the surfaces to the pool below, and, so flowing in a sort of a sheet, is suggestive of the Trumble process. But the filming is only slight and incidental, and apparently these features of appellant's apparatus are primarily designed to get the requisite exposure for the escape of gas, by dividing the body of the froth into drops and splashes and streamlets, rather than by spreading it as a sheet or film on a solid backing, and also to guard the settling pool against direct

discharge into it of the incoming stream at a high velocity causing violent agitation and interfering with the separation, by gravitation, of the sand and water from the oil."

In each of the devices charged to be infringements on the present motion (Figs. 1 to 6, inclusive, except Fig. 2 of Exhibit "A" of the McGraw affidavit) the circular trough inside of the separator is practically a continuation of the oil inlet pipe except the form illustrated in Fig. 3 of said exhibit, which more nearly resembles Model 16 found by Judge Bledsoe not to infringe. The oil flows in the bottom of the trough at a considerable depth and no separation takes place in this oil inlet passage that is of any particular consequence, the only real separation taking place when the oil is discharged into the chamber, constituting the main portion of the trap. The oil then flows from the end of the inlet pipe, some of it no doubt striking the chamber wall and flows down such wall in a stream. The part that does not strike the chamber wall falls directly to the settling pool.

Fig. 2 of Exhibit "A" of the McGraw affidavit illustrates a form of trap which has been adjudicated by the Court of Appeals not to be within the scope of the Trumble patent and not to be an infringement thereof.

The language of the Circuit Court of Appeals in its opinion in the former case about the middle of page 59 of 290 Fed. Reporter, clearly differentiates the forms of device alleged in this present proceeding to be infringements as follows:

"Our conclusion is that, in the light of the prior art and the patentee's interpretation of his claims in the Patent Office, the claims are to be read only upon apparatus by which substantially the whole body of oil is spread as [83] a film or thin sheet on a backing wall, and is not, in the course of the process of separation, broken up by any means into drops or streamlets; and, if so read, they do not reach the structure exhibited in the drawings of appellant's patent or in the model identified by the bell-shaped discharge nipple."

I know from my past experience in litigation involving the Trumble patent in suit that any preliminary injunction which might be granted by this Court will be advertised in every possible way in order to injure the goodwill of defendant as much as possible. To the confusion of the trade and public the real scope of the Trumble patent in suit will be subtly misrepresented in ways impossible of control by the Court. Any bond which may be given by plaintiffs cannot possibly be adequate to cover the resulting irreparable injury which must inevitably follow the issuance of such an injunction, as sought by the present motion.

I have never been secretive about disclosing the construction of the models and designs of my trap. They have been freely advertised and their interior construction shown to prospective purchasers and others, and I have always given full information to plaintiffs concerning their construction and design. This is particularly apparent from the affidavit of

William McGraw, near the bottom of page 6 of said affidavit, where said witness admits, that I exhibited drawings to a representative of plaintiffs showing the trap designated as Fig. 1 of Exhibit "A" of said affidavit. It is to be noted also that McGraw—(page 2, line 11 of the affidavit) admits that he knew of the manufacture and sale by me of the trap of said Fig. 1 in the spring or summer of 1928.

Since that time plaintiffs have permitted me to continue in the business and built up a large and extensive trade in the manufacture and sale of the traps now complained of for over a year and therefore have been guilty of a great and unreasonable delay in calling to the attention of this Court their present alleged rights; which is entirely inconsistent with their present contention, that they [84] are being irreparably injured by my acts in the premises.

The defendant Lorraine Corporation is amply able financially to pay all possible damages which might be finally *be* decreed against them in case infringement should be found. In case of a final decision in favor of plaintiffs in this case, plaintiffs would be entitled to the recovery of a money judgment, but in the event a preliminary injunction should be granted on the present motion, possible recovery on plaintiffs' injunction bond could not repair the injury done to the goodwill of defendant company, and as before stated plaintiffs have waited long before asserting their present alleged rights.

Fig. 3 of the McGraw affidavit was first made by

me prior to July 25, 1928, and with the full knowledge of plaintiffs and without protest from them until the filing of the present suit.

Fig. 6 of the McGraw affidavit was first made by me about September, 1928, and since, and yet there has been no protest by plaintiffs until this suit has been filed. Fig. 2 of the McGraw affidavit is a design that is covered by my patent No. 1,620,771, granted May 26, 1924. The first trap of this design was made by me before the filing date of the application for the patent last referred to that is prior to May 26, 1924, and since, and yet there has been no protest on the part of plaintiffs since the decision of the Court of Appeals until the filing of this suit. I believe that all of the traps which are now complained of were made at least a year prior to the filing of the present suit and there has been no protest by plaintiffs nor claimed that they infringed until this application was made.

In the proceedings on contempt involving Model 16 (which was, as before stated, found by Judge Bledsoe, not to constitute an infringement of the patent in suit) certain apparatus was set up in the yards of the Lacey Manufacturing Company on North [85] Main Street to show what happened to oil when it flowed into and through a trap. At that time Court and counsel were invited to attend a test of the trap and provision was made to observe the inside of the trap during operations. We invited Court or counsel to select their own grade or quality of oil and measure of oil and gas and pressure conditions, but our invitation was declined.

However, we did produce affidavits on said motion fully describing the tests that we had made and illustrating them as far as was possible by accurate photographs. I attached hereto a set of the photographs forming part of our showing in opposition to the motion in contempt proceedings, which will show how the oil will flow out of the end of a pipe and will show clearly that whether the volume is large or small it at no time spreads out on the wall of the separator in anything resembling a film. This showing is particularly pertinent as a demonstration that the form of trap illustrated in the drawings attached to the license agreement set up in the bill of complaint herein, cannot possibly be an infringement of the Trumble patent under any possible interpretation of such patent.

DAVID G. LORRAINE.

Subscribed and sworn before me this 1st day of October, 1929.

[Seal] MARGARET FEENEY,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires July 2/33. [86]

[Title of Court and Cause—Cause No. Q.-38-M.]

AFFIDAVIT OF T. D. BOYCE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION.

State of California,
County of Los Angeles,—ss.

T. D. Boyce, being first duly sworn, deposes and says: I reside at 4229¼ West 28th Street, Los Angeles, California. I am a petroleum engineer with about 25 years of experience. I have had a very wide and extensive experience during that time in all branches of the oil business. I was employed by the Associated Oil Company of California in the central and northern portions of the state 20 years ago doing general work in the engineering line relating to petroleum. During the latter portion of such time I was made manager of the equipment department of the Associated Oil Company at San Francisco.

After leaving the employ of the Associated Oil Company I worked for two small companies in the same general capacity for nearly two years. Shortly after this time I was employed by the Edward L. Doheny interests doing miscellaneous and general engineering work in connection with the petroleum industry having much to do with the handling of the various devices and equipment [91] necessary for the handling of oil which included the drilling of oil-wells. During the past 25 years I have been fully acquainted and very familiar with the construction and mode of operation

of various mechanical aids for oil and gas productions.

I have been familiar with the operation of oil and gas separators to be attached to flowing wells since about 1910, possibly a little later. In those early days there was not much attention paid to the conservation of gas, and large quantities of gas was permitted to go to waste. It has only been since about 1916, at which time the manufacture of casing-head gas became an industry that real conservation of natural gas has attracted any particular attention among oil producers. Previous to that time it was customary to blow gas in the air through two or three inch pipes set fifteen or twenty feet up in the air, and the gas was used to furnish illumination for the camps and leases in general.

I was also employed in the same general capacity, which covered a very wide miscellaneous field necessitating knowledge of all phases of the oil industry by Doheny interests for approximately nine or ten years during which time my duties brought me in intimate contact with all forms of oil-well devices. Since that time I was employed by the Guggenheim interests in Alaska for exploration and development work in the petroleum industry and during which time I had full charge of the drilling of various exploratory wells. Since that time I have followed the profession of an independent petroleum engineer.

I am very familiar with the construction and mode of operation of gas and oil separators, as I have before intimated and particularly those in use at the present time.

I have seen and examined and am familiar with the Trumble patent in suit in the above-entitled cause and I am also familiar with the different forms of such devices made and sold by the defendant Lorraine Corporation and referred to in the affidavit of [92] William McGraw and illustrated in the exhibits attached thereto which I understand are contended to be infringements of the said Trumble patent. I have also examined models of such alleged infringement and I understand perfectly the manner in which such devices operate. I am quite familiar with the manner in which oil behaves when it enters the gas trap. It is usually mixed with gas and the proportions of gas and oil that comes from a flowing well into a trap vary greatly at different wells.

It is not true as stated in affidavits filed on behalf of plaintiffs on the present motion in opposition to which this affidavit is given that any oil entering any of the devices referred to in the McGraw affidavit after reaching the interior of the trap flows in anything which might be properly described as a thin film down the walls of the separator. Most of the oil entering into the main portion of the trap is allowed to fall in streams or drops to the oil level below and while undoubtedly some of such oil will strike the walls of the separator and will flow down thereover, it will flow in a stream of uneven thickness. The principle of separation employed in defendant's trap is not by spreading the oil in any thin film on any solid backing but consists of divid-

ing it up into drops or streams and allowing the separation to take place while so divided.

T. D. BOYCE.

Subscribed and sworn to before me this 1st day of October, 1929.

[Seal] MARGARET FEENEY,

Notary Public in and for said County of Los Angeles, State of California.

My commission expires July 2/33. [93]

[Title of Court and Cause—Cause No. Q.-38-M.]

AFFIDAVIT OF E. P. SHAW IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION.

State of California,
County of Los Angeles,—ss.

E. P. Shaw, being first duly sworn, deposes and says: I live at 2142 Veteran Avenue, Los Angeles, California, and have had considerable experience in the operation of gas and oil separators since 1920 and I understand fully their mode of operation and effects. I have given very careful attention to the study of the Trumble patent referred to in the bill of complaint in the above-entitled suit and also the patents to Mr. Lorraine mentioned in his affidavit filed contemporaneously herewith and also to a patent granted to George H. Gillon on closely similar construction.

I have examined the various figures 1 to 6 inclusive of Exhibit "A" of the affidavit of William Mc-

Graw filed in support of the motion for injunction in the above-entitled cause and have also examined models fully illustrating such construction and I understand fully the same and also the mode of operation of gas traps so constructed. In all the forms immediately above referred to except Fig. 2 the oil enters the circular covered trough which [94] forms practically a continuation of the inlet pipe. The oil is not spread in any thin film inside of the trough, but is merely caused to flow through same covering the bottom thereof to a substantial thickness. There is no real or substantial separation of gas and oil until the oil is discharged into the main chamber of the trap. When it is discharged some of it may strike the wall of the separator and flow downwardly thereover in a stream but a large portion falls directly to the pool of oil in the settling chamber and does not come in contact with said wall and is not in any manner spread in a thin film or any kind of a film on any backing.

These circular troughs of various forms in defendant's trap are merely devices for decreasing velocity so as to permit quiescence in the settling chamber. They have no function of spreading out the oil on any surface of the trap in any film. The principle of separation used in the Lorraine trap complained of and which I have just considered is that of breaking up the oil into streams or drops and permitting some of it to flow in a solid stream on the wall of the separator possibly spread out to some degree, but not in such a form as to be properly designated a film. A large portion of the oil being discharged into the chamber drops directly to

the oil level in the settling chamber without coming in contact with the wall.

E. P. SHAW.

Subscribed and sworn to before me this 1st day of October, 1929.

[Seal] MARGARET FEENEY,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires July 2/33.

[Indorsed]: Filed Oct. 2, 1929.

Received copy of the within notice, etc., this 2d day of October, 1929.

LYON & LYON,
HENRY S. RICHMOND,
Attorneys for Plaintiff. [95]

[Title of Court and Cause—Cause No. Q.-38-M.]

REBUTTAL AFFIDAVIT OF ALFRED J. GUTZLER IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

State of California,
County of Los Angeles,—ss.

I am one of the plaintiffs above named and a member of the copartnership doing business under the firm name of Trumble Gas Trap Company. My attention has been called to certain statements made in the affidavit of David G. Lorraine filed in the above-entitled cause executed October 1, 1929, and particularly to statements appearing at pages 2 and

3 of said affidavit to the effect that the license granted by plaintiffs to the defendant corporation referred to therein was without any consideration whatsoever, etc. These statements are not correct.

The license granted by plaintiffs to defendant Lorraine Corporation under the letters patent in suit, dated April 2, 1926, a copy of which is annexed to the complaint herein, was in consideration of an agreement entered into on even date therewith between David G. Lorraine, defendant Lorraine Corporation and plaintiffs, a true copy of which agreement is annexed [96] hereto as Exhibit "A" to this affidavit. Contemporaneously with the grant of the license by plaintiffs to defendant Lorraine Corporation above mentioned and pursuant to said agreement a license was granted by defendant Lorraine Corporation to plaintiffs under reissue letters patent No. 15,220, a true copy of which license is annexed hereto as Exhibit "B" to this affidavit, and a license was given by David G. Lorraine to plaintiffs under letters patent No. 1,396,860 and No. 1,533,744, a true copy of which is annexed hereto as Exhibit "C" to this affidavit. Each of the licenses so exchanged were fully paid and were given in consideration of the exchange and in further consideration of the agreement constituting Exhibit "A" hereto and the termination of the litigation between the parties therein recited. At the time of this exchange plaintiffs were the defendants in certain litigation mentioned in said agreement and Lorraine was the defendant in certain litigation then pending and in which plaintiffs had been granted permission to file a supplemental bill charging that

defendants then type 16 trap was an infringement of the letters patent involved in the above-entitled suit. The agreement Exhibit "A" and the licenses Exhibits "B" and "C" constituted a valuable consideration in exchange for which plaintiffs granted to defendant Lorraine Corporation the license of April 2, 1926, copy of which is annexed to the bill of complaint in the above-entitled cause. The license agreements Exhibits "B" and "C" to this affidavit were limited to the employment of the patented inventions by plaintiffs in complete units and did not license plaintiffs to supply any parts embodying such inventions for installations in apparatus that the plaintiffs had already sold and placed in installation prior thereto. Each of the licenses constituting Exhibits "B" and "C" hereto and the license annexed [97] as an exhibit to the bill of complaint in the above-entitled cause were fully paid. Plaintiffs have manufactured and installed a very large volume of apparatus under the licenses, copies of which constitute Exhibits "B" and "C" hereto, upon which plaintiffs have paid no royalty to defendant corporation or to David G. Lorraine because each of the three licenses exchanged on April 2, 1926, between the parties as aforesaid were fully paid licenses free of royalty.

Subsequent to the exchange of the aforesaid licenses and on the 24th day of November, 1926, plaintiffs obtained from David G. Lorraine an additional and separate license under letters patent No. 1,533,744, granting to plaintiffs the privilege to install the valve arrangement covered by said letters patent in apparatus that had been manufac-

tured and installed prior to April 2, 1926. A true copy of this license is annexed hereto as Exhibit "D" to this affidavit. In accordance with this license Exhibit "D," plaintiffs have paid $35.00 upon each of such valve arrangements so made and sold by plaintiffs for addition to previously installed apparatus as provided in said license. These are the only royalties paid by plaintiffs to defendant Lorraine Corporation or to David G. Lorraine and are the royalties referred to in the aforesaid affidavit of David G. Lorraine at page 2, line 29, to page 3, line 2.

I have set forth the above facts to show that the statements contained in the aforesaid affidavit of David G. Lorraine in the above-entitled cause, to wit, that the license granted by plaintiffs was without any consideration whatsoever, etc., are not true and correct.

ALFRED J. GUTZLER.

Subscribed and sworn to before me this 7th day of October, 1929.

[Seal] MEYER WEISMAN,

Notary Public in and for the County of Los Angeles, State of California. [98]

EXHIBIT "A."

AGREEMENT.

THIS AGREEMENT, entered into this 2nd day of April, 1926, by and between DAVID G. LORRAINE, residing at Compton, and LORRAINE CORPORATION, a Nevada Corporation, hereinafter referred to as first parties, and FRANCIS

M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, co-partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY, having their principal place of business at Los Angeles, California, hereinafter referred to as second parties.

WHEREAS, the parties hereto are and have been engaged in the business of manufacturing and selling apparatus for the separation of oil and gas, commonly known in the trade as Gas Traps, and have been engaged in litigation in the United States Courts, regarding the alleged violation of patent rights owned by the respective parties; and,

WHEREAS, it is the desire of the said respective parties to terminate all pending litigation and to mutually co-operate with a view to protecting the rights of the respective parties hereto.

NOW, THEREFORE, for and in consideration of the mutual covenants herein expressed and the mutual covenant and agreement to execute and exchange licenses under certain patents owned by the respective parties, the basis of such suits hereinabove referred to, the parties hereto agree as follows:

I.

In that certain suit entitled Equity No. E.–113–M., in which FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, co-partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY, are Plaintiffs, and DAVID G. LORRAINE is Defendant, it is mutually agreed by and between the par-

ties hereto that a final decree may be entered therein, waiving all profits and damages, each party to pay its own costs and disbursements subsequent to the entry of the interlocutory decree therein. [99]

II.

In that certain suit entitled Equity J–112–H, in which DAVID G. LORRAINE and LORRAINE CORPORATION are Plaintiffs, and in which FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, co-partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY, are defendants, it is mutually agreed by and between the parties hereto that, that certain identified suit, J–112–H, may be, upon motion of either party hereto dismissed with prejudice.

III.

In that certain suit entitled Equity J–113–M, in which DAVID G. LORRAINE is Plaintiff, and in which FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, co-partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY, are Defendants, it is mutually agreed by and between the parties hereto that, that certain identified suit, J–113–M, may be, upon motion of either party hereto dismissed with prejudice.

IV.

It is further covenanted and agreed by and between the parties hereto that the respective parties

shall vigorously prosecute infringements of the patents owned by them relating to gas traps and operating mechanism therefor at the sole cost and expense of the party owning such patents, the parties hereto agreeing to co-operate with each other and rendering assistance in the way of data and information.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

D. G. LORRAINE.
LORRAINE CORPORATION.
By D. G. LORRAINE,
President.
TRUMBLE GAS TRAP COMPANY.
By F. M. TOWNSEND. [100]

EXHIBIT "B."

LICENSE.

WHEREAS, the LORRAINE CORPORATION, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, is the sole and exclusive owner of reissued Letters Patent of the United States, numbered 15,220, reissued on the 8th day of November, 1921, for Oil, Gas and Sand Separator; and,

WHEREAS, FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, co-partners, doing business under the firm name and style of the TRUMBLE GAS TRAP COMPANY, are desirous of obtaining a license to manufacture

and sell Gas Traps under said reissued Letters Patent.

NOW, THEREFORE, for and in consideration of Ten ($10.00) Dollars to it in hand paid and other good and valuable considerations, the receipt of which is hereby acknowledged, the said LORRAINE CORPORATION hereby grants to FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, co-partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY, a non-exclusive license to manufacture and sell GAS TRAPS under said reissued Letters Patent No. 15,220 in substantial accordance with that certain drawing attached hereto and made a part hereof embodying a single slide oil and gas control, for the life of said reissued Letters Patent, throughout the United States, free of any royalty for such manufacture and sale.

This License is subject to the condition that all Gas Traps sold by the parties named herein shall be complete units and that neither party named herein shall sell parts separate and apart from complete units except as repair or replacement for such complete units.

IN WITNESS WHEREOF, the said LORRAINE CORPORATION has executed this License this 2nd day of April, 1926.

LORRAINE CORPORATION.
By D. G. LORRAINE,
President.

R. O. ADAMS.
L. H. CARPENTER. [101]

EXHIBIT "C."

LICENSE.

WHEREAS, DAVID G. LORRAINE of Lynwood, California, is the sole and exclusive owner of Letters Patent of the United States, No. 1,396,860, granted on the 15th day of November, 1921, on METHOD AND APPARATUS FOR SEPARATING OIL AND GAS, and Letters Patent of the United States, No. 1,533,744, granted on the 14th day of April, 1925, on OIL AND GAS SEPARATOR, and

WHEREAS, FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, co-partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY are desirous of obtaining a license to manufacture and sell Gas Traps under both of said Letters Patent.

NOW, THEREFORE, for and in consideration of Ten Dollars ($10.00) to me in hand paid and other good and valuable considerations, the receipt of which is acknowledged, I, the said DAVID G. LORRAINE hereby grant to FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, co-partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY, a non-exclusive license to manufacture and sell Gas Traps under said Letters Patent No. 1,396,860, and under said Letters Patent No. 1,533,744, in substantial accordance with that certain drawing attached hereto and made a part hereof embodying a single slide oil and

gas control, for the life of said letters patent, and any reissue thereof, throughout the United States, free of any royalty for such manufacture and sale.

This License is subject to the condition that all Gas Traps sold by the parties named herein shall be complete units and that neither party named herein shall sell parts separate and apart from complete units, except as repair or replacement for such complete units.

IN WITNESS WHEREOF, the said DAVID G. LORRAINE has executed this license this 2nd day of April, 1926.

D. G. LORRAINE,
President.

Witnesses:
R. O. ADAMS,
L. H. CARPENTER. [103]

EXHIBIT "D."

AGREEMENT.

THIS AGREEMENT entered into this 24th day of November, 1926, by and between DAVID G. LORRAINE, residing at Lynwood, California, and TRUMBLE GAS TRAP COMPANY, a co-partnership consisting of FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, having its principal place of business at Los Angeles, California; and

WHEREAS, the parties hereto, under date of April 2, 1926, entered into certain License Agreements referring to the manufacture and sale of Gas Traps including those coming within the terms of Letters Patent No. 1,533,744, issued on the 14th day of April, 1925; and

WHEREAS, it is the intent of the parties to modify such Agreements in so far as the same refer to the manufacture and sale of Single Slide Oil and Gas Control Valves,

NOW, THEREFORE, the parties agree together as follows:

The said DAVID G. LORRAINE hereby grants the TRUMBLE GAS TRAP COMPANY a license to manufacture, sell and install on gas traps sold by TRUMBLE GAS TRAP COMPANY, prior to the execution of the Agreements herein referred to and dated April 2, 1926, Single Slide Oil and Gas Control Valves embodying the inventions set forth in said Letters Patent, upon the following terms and conditions:

The TRUMBLE GAS TRAP COMPANY, for each and every valve installed and sold, shall pay the said DAVID G. LORRAINE the sum of THIRTY FIVE ($35.00) DOLLARS, the TRUMBLE GAS TRAP COMPANY to account to the said DAVID G. LORRAINE on the 20th day of each month during the life of this Agreement showing the number of such Valves sold by the TRUMBLE GAS TRAP COMPANY during the preceding calendar month, and shall accompany each such statement by payment in full of all money due the said DAVID G. LORRAINE under this Agreement at the time of each such statement. [105]

IT IS UNDERSTOOD AND AGREED that the sum of THIRTY FIVE ($35.00) DOLLARS per value herein agreed to be paid shall not be considered a license fee nor as fixing a license fee for the right to manufacture and sell valves under the said Letters Patent, but is in consideration of the true and faithful performance by the TRUMBLE GAS TRAP COMPANY, and other good and valuable considerations, the receipt of which is hereby acknowledged, under the Agreements of April 2, 1926, hereinabove referred to.

DAVID G. LORRAINE.

TRUMBLE GAS TRAP COMPANY.

By F. M. TOWNSEND.

A. J. GUTZLER.

M. J. TRUMBLE. [106]

[Title of Court and Cause.—Cause No. Q.-38-M.]

REBUTTAL AFFIDAVIT OF WILLIAM McGRAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

State of California,
County of Los Angeles,—ss.

I am the William McGraw who executed an affidavit on the 11th day of September, 1929, on file in this cause and as manager of the copartnership Trumble Gas Trap Company, plaintiff above named, have kept informed as to the competitive efficiency of Trumble and Lorraine traps. I have read the affidavit of David G. Lorraine filed in this cause in opposition to the motion for a preliminary injunction, in which Mr. Lorraine states that plaintiffs have at all times had full information concerning the construction and design of the Lorraine traps and have unreasonably delayed in asserting their rights against the infringement complained of in this cause. I find in Mr. Lorraine's affidavit certain statements that are not correct to my knowledge.

When I learned of the manufacture and sale by Lorraine Corporation of gas traps having the constructions illustrated in [107] Figures 1-4 of Exhibit "A" to my affidavit aforesaid, the defendant corporation was then engaged in repeatedly changing the construction of its traps. The details of these variations in constructions were not all known to plaintiffs. When in use in the field, the Lorraine traps are completely enclosed and the

interior thereof cannot be examined. The traps are ordinarily shipped from the factory of the defendant corporation fully assembled. Information received from the defendant regarding the construction and design of its traps could not be relied upon by plaintiffs. Plaintiffs have had no means of knowing that when defendant exhibited a trap to plaintiffs at the defendant's factory, that the interior construction of such trap corresponded to the interior construction of any particular trap in use in the field.

I found that traps of these constructions (Figures 1–4) were not of an efficiency satisfactory to the users. I was advised that in July, 1929, the Union Oil Company returned certain Lorraine traps to the defendant corporation because the efficiency of the traps was not satisfactory. The interior construction of these traps was either changed or new traps supplied to the Union Oil Company in lieu thereof. The traps then exhibited a greater efficiency than any Lorraine traps that I had been familiar with. Accordingly I obtained permission and examined the interior of these traps on the 12th day of August, 1929, as stated in my affidavit aforesaid. If defendant Lorraine Corporation has been making or selling gas traps constructed as illustrated in Figures 5 and 6 of Exhibit "A" to my affidavit aforesaid for over a year as stated in the affidavit of Mr. Lorraine, plaintiffs had had no knowledge of this fact. The first knowledge of plaintiffs that defendant Lorraine Corporation was making or selling such gas traps was obtained by

me as a [108] result of the examinations I made on the 12th day of August, 1929, as stated in my affidavit aforesaid.

The oil companies have found by comparing the competitive efficiencies of the Lorraine and Trumble traps over a period of years, and now know that a gas trap cannot have an efficiency comparable to that of the Trumble trap unless it is so constructed that substantially the whole body of oil is spread as a film or a thin sheet on a backing wall and is not, in the course of the process of separation, broken up by any means into drops or streamlets. That defendant Lorraine Corporation has also found the same to be true is evidenced by the fact that the defendant has been compelled after repeated changes and variations in the construction of its trap to now adopt the construction illustrated in Figures 5 and 6 of Exhibit "A" to my affidavit aforesaid in which the defendant has now embodied a construction which assures such spreading of the oil. The injunction sought by plaintiffs on this motion is directed to gas traps having the construction illustrated in these Figures 5 and 6 and plaintiffs have brought the above-entitled suit and this motion for a preliminary injunction without delay upon learning for the first time that the defendant was manufacturing and selling such types of traps.

WILLIAM McGRAW.

Subscribed and sworn to before me this 8th day of October, 1929.

[Seal] R. S. ZIMMERMAN,
Clerk U. S. District Court, Southern District of California.

By Edmund L. Smith,
Deputy.

[Indorsed]: Filed Oct. 8, 1929.

Due service and receipt of a copy of the within ——— is hereby admitted this 8 day of Oct., 1929.

J. F. WESTALL,
Atty. for ————. [109]

[Title of Court and Cause—Cause No. Q.–38–M.]

STIPULATION FOR USE OF UNCERTIFIED COPIES OF PATENTS.

It is hereby stipulated and agreed by the parties to the above suit by their solicitors that uncertified printed copies of the specifications and drawings of United States letters patent and uncertified photographic prints or copies furnished by the United States Patent Office of any pertinent foreign letters patent may be received in evidence herein, with the same force and effect as the originals or as though duly certified by the Commissioner of Patents, subject, however, to correction by production of originals or duly certified copies if any error be found therein; and that the recitals of the dates therein upon which the applications for such

patents shall purport to be made be deemed *prima facie* proof of the dates of the filing thereof.

Dated this 27th day of September, 1929, Los Angeles, Calif.

LYON & LYON,
HENRY S. RICHMOND,
_____,
_____,
_____,
Solicitors and of Counsel for Plaintiffs.

WESTALL and WALLACE,
By JOSEPH F. WESTALL,
Solicitors and of Counsel for Defendant. [110]

[Indorsed]: Filed Oct. 8, 1929. [111]

At a stated term, to wit, the September Term, A. D. 1929, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Saturday, the 21st day of December, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable WM. P. JAMES, District Judge.

[Title of Cause—Cause No. Q.–38–M.]

MINUTES OF COURT—DECEMBER 21, 1929—ORDER DENYING APPLICATION FOR TEMPORARY INJUNCTION.

This cause having been heretofore submitted to the Court on motion of plaintiff for temporary injunction, on argument of counsel and written briefs, and the court being now fully advised, hands down its written opinion and orders that application for temporary injunction is denied, and exception is allowed to the plaintiffs. Opinion is filed herein. [111D—112]

[Title of Court and Cause—Cause No. E.–113.]

MEMORANDUM OPINION.

FREDERICK S. LYON, Esq., LEONARD S. LYON, Esq., and FRANK L. A. GRAHAM, Esq., for the Plaintiffs.

JOSEPH F. WESTALL, Esq., for the Defendant.

BLEDSOE, District Judge.—This is an applica-

tion to have the defendant punished as for contempt of an injunctive order issued pursuant to an interlocutory decree rendered by Judge Wolverton sitting for this court. Due to the insistent and unremitting pressure of other causes, particularly criminal, confronting the Court, the determination of the matter has been held in abeyance for a very considerable period. This, however, has not sufficed to prevent the Court from giving the matter the very careful attention of which it is deserving.

Without going into details, because of pressure of other matters demanding consideration, it must suffice to say that I can find no justification for holding the defendant guilty of contempt. Admittedly the only device made by him after the injunctive order was served was Model No. 16. This model was not a colorable adaptation of either of the models held to be infringements by Judge Wolverton, and as a matter of fact, under the evidence presented, was not susceptible of the same criticism indulged by Judge Wolverton with respect to the [113] infringing models, nor susceptible of being classed within the devices covered by the patent. In the course of his opinion Judge Wolverton says, "I am impressed that the patentee is not confined to means causing the oil to flow down the outer wall of the chamber, but that his patent includes any means that will cause the oil to flow down any surface as well, such as a baffle-plate or inner partition of the wall, which is reached after the emulsified oil enters the chamber."

Without indicating any opinion as to whether or not Model 16 is an infringement of the patent

as construed by the Circuit Court of Appeals, 290 Federal, 54, at page 59, I am constrained to hold that it was not a violation of the injunction of Judge Wolverton, and that therefore the proceedings in contempt should be dismissed.

It is so ordered.

June 30th, 1924.

[Indorsed]: Filed Jun. 30, 1924. [114]

[Title of Court and Cause—Cause No. Q.–38–M.]

OPINION.

Messrs. LYON & LYON, FRANK L. A. GRAHAM, and HENRY S. RICHMOND, of Los Angeles, California, Attorneys for Plaintiffs.

Messrs. WESTALL and WALLACE, of Los Angeles, California, Attorneys for Defendants.

Application is made in this suit for a temporary injunction. Infringement is charged, the patent involved being for an apparatus commonly known as an oil and gas separator. Such devices are in general use in the oil-fields, and serve the purpose of separating and collecting the gas which accompanies the flow of crude oil from producing wells. No detailed description of the process by which the desired result is accomplished need be given. Method and means have been given elaborate attention in decisions made in cases wherein the parties now litigating were before the Court. The Circuit Court of Appeals in Lorraine vs. Townsend, 290 Fed. 54, considered the patent of the plaintiff

here, and held that it was valid, although entitled to no claim as of generic or pioneer character. [115]

The patentable invention found was held to affect only the manner in which the oil, upon entering the chamber of the trap, was distributed. The Court determined that the claims of the Trumble patent were valid only when read upon an apparatus "by which substantially the whole body of oil is spread as a film or thin sheet on a backing wall, and is not, in the course of the process of separation, broken up by any means into drops or streamlets. . . . . "

In the Trumble device the oil entering the chamber is discharged upon conical spreaders imperforate in surface, which extend near to and entirely around the inner circumference of the shell of the trap. In process of operation, the oil is said to dispose itself in a thin sheet not only over the spreaders, but leaving the spreaders it would reach the sides of the chamber and continue downward, still in a thin sheet, and equally disposed. It is not probable that in actual operation, with fluctuating heads of oil and gas, the thing will work to the degree of perfection which the description just used implies, but it evidently attains some approximation of that condition. The Court of Appeals greatly restricted the finding of the trial Judge made favorable to the Trumble claims, and held that one device only of those exhibited as having been produced by Lorraine, came within the field of infringement. That was Towner (or Tonner) No. 3, as the trap was designated in the record in that case. Reading the decision with the argument for the narrow construction which the Court allowed to the Trum-

ble patent, it would seem that Towner No. 3 trap is a border-land device as measured by the Trumble invention; it comes within the field with little to spare. In that device a baffle-plate is used, and therein is the only similarity of construction of Towner No. 3 and Trumble. The infringing device did not utilize, as Trumble utilized, [116] baffle-plates of extensive surfaces in conjunction with the circular interior surface of the shell as a backing wall upon which to so dispose the oil that it might be rendered into a thin film. Lorraine used only a segment of the wall with one baffle-plate. It should be affirmed, I think, that the extreme range of equivalence possible to be allowed to Trumble was reached in the holding that Towner No. 3 infringed. The Trumble patent is not for any apparatus that will distribute the oil in the oil trap in a thin film upon a backing wall; it is for a device that is as the Trumble patent describes, and one that operates as that does.

If the inlet pipe extended entirely around the inner circumference of the trap shell and was perforated thickly with outlet holes through which the oil would be directly projected against the wall of the shell, so that it formed approximately a continuous film, which would flow down the surface, it could not be contended at all that Trumble's invention was represented in that device. There would be no equivalency except in the result attained. Then, supposing that the feed pipe in another form extended around the inner circumference of the shell, and that outlet apertures directed

at an angle toward the surface of the shell, affected the projection of the oil upon that circular surface, one stream connecting with the other, the whole effect being to cause the oil to run down the inner surface of the shell in a more or less continuous sheet, plainly there would be no infringement of the Trumble patent. These illustrations serve to emphasize the fact that it is the form of apparatus that gives to the Trumble device its distinction and novelty.

In the model which defendant has marketed, the inlet pipe is enlarged after entering the shell of the trap, and prolonged completely around the shell, the opening being against the side of the shell. At the point of opening, the lower wall [117] of the conduit is bent downward and brought to an end, while the inner wall alone is continued some distance further. It is quite plain that the main force of the oil is directed against the inner wall of the shell, and spread upon that wall, the amount of forward spreading being naturally dependent upon the amount of force which propels the stream of fluid. A considerable part of the stream must also drop at and after the point where the lower wall of the conduit is brought to an end.

In my opinion, the apparatus is not reasonably an equivalent of Trumble's use of the oil-spreading baffle-plates. I think to hold differently would be to allow a claim for the broadest kind of equivalents, far beyond that permitted by a fair interpretation of the decision of the Circuit Court of Appeals.

The application for a temporary injunction will be denied. An exception is allowed the plaintiffs.

Dated this 21 day of December, 1929.

WM. P. JAMES,
U. S. District Judge.

[Indorsed]: Filed Dec. 21, 1929. [118]

[Title of Court and Cause—Cause No. Q.–38–M.]

PETITION FOR APPEAL.

To the Honorable Judge of Said Court:

The above-named, Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Co., plaintiffs, feeling aggrieved by the order entered in the above-entitled cause on the 21st day of December, 1929, do hereby appeal from said order to the Honorable United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignments of error filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be re-

quired of them be made, all of which is respectfully submitted.

FRANCIS M. TOWNSEND,
MILON J. TRUMBLE and
ALFRED J. GUTZLER,

Doing Business Under the Firm Name of Trumble Gas Trap Co., Plaintiffs,

By LYON & LYON,
FREDERICK S. LYON,
LEONARD S. LYON,
HENRY S. RICHMOND,
FRANK L. A. GRAHAM,
Their Attorneys. [119]

[Indorsed]: Filed Jan. 17, 1930. [120]

[Title of Court and Cause—Cause No. Q.-38-M.]

ASSIGNMENTS OF ERROR.

Now come the above-named plaintiffs, Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Company, and file the following assignments of error upon which they will rely upon the prosecution of the appeal in the above-entitled cause from the order entered and recorded on the 21st day of December, 1929, by this Court denying plaintiffs' application for a temporary injunction.

That the United States District Court for the Central Division of the Southern District of California erred—

1. In denying plaintiffs' application for temporary injunction.

2. In not finding that devices manufactured and sold by defendant made in accordance with Figures 5 and 6 of Exhibit "A" and Exhibits "A–5" and "A–6" to the affidavit of William McGraw were infringements of Claims 1, 2, 3, and 4 of United States letters patent No. 1,269,134.

3. In finding that "The Trumble patent is not for any [121] apparatus that will distribute the oil in the oil trap in a thin film upon a backing wall."

4. In finding that "it would seem that Towner No. 3 trap is a border-land device as measured by the Trumble invention it comes within the field with little to spare."

5. In finding that a considerable part of the stream of oil delivered from the runaround baffle of Figures 5 and 6 of Exhibit "A" must also drop at and after the point where the lower wall of the conduit is brought to an end.

6. In finding "the apparatus is not reasonably an equivalent of Trumble's use of the oil-spreading baffle-plates."

7. In stating that to find defendant's device reasonably an equivalent of Trumble's oil-spreading baffle-plates "would be to allow a claim for the broadest kind of equivalents, far beyond that permitted by a fair interpretation of the decision of the Circuit Court of Appeals."

8. In finding that "If the inlet pipe extended entirely around the inner circumference of the trap

shell and was perforated thickly with outlet holes through which the oil would be projected against the wall of the shell so that it formed approximately a continuous film which would flow down the surface it could not be contended at all that Trumble's invention was represented in that device."

9. In finding, "Then, supposing that the feed pipe in another form extended around the inner circumference of the shell and that outlet apertures directed at an angle towards the surface of the shell effected the projection of the oil upon that circular surface one stream connecting with the other, the whole effect being to cause the oil to run down the inner surface of the shell in a more or less continuous sheet, plainly there would be no infringement of the Trumble patent." [122]

10. In finding "that it is the form of apparatus that gives to the Trumble device its distinction and novelty."

11. In not finding that devices manufactured and sold by defendant like Figures 5 and 6 of Exhibit "A" to the affidavit of William McGraw come within the scope of Claims 1, 2, 3 and 4 of the patent in suit No. 1,269,134, as defined by the Court of Appeals of the Ninth Circuit in the case of Lorraine vs. Townsend reported in 290 Federal Reporter, at page 54 et seq.

12. In not finding that the runaround baffles of the devices manufactured and sold by the defendant, like Figures 5 and 6 of Exhibit "A" to the affidavit of William McGraw, were such apparatus by which substantially the whole body of oil is spread as a film or thin sheet on a backing wall and is not, in

the course of the process of separation, broken up by any means into drops or streamlets.

WHEREFORE appellants pray that said order be reversed and that said District Court of the Central Division for the Southern District of California be ordered to enter an order vacating its order denying plaintiffs' application for a temporary restraining order and that it enter an order granting to plaintiffs a temporary injunction in this cause as prayed in the bill of complaint.

FRANCIS M. TOWNSEND,
MILON J. TRUMBLE,
ALFRED J. GUTZLER,
Doing Business Under the Firm Name of Trumble Gas Trap Company,
By FREDERICK S. LYON,
Solicitor for Said Plaintiffs.

LYON & LYON,
FREDERICK S. LYON,
LEONARD S. LYON,
HENRY S. RICHMOND,
FRANK L. A. GRAHAM,
Solicitors and of Counsel for Plaintiffs.

[Indorsed]: Filed Jan. 17, 1930. [123]

[Title of Court and Cause—Cause No. Q.-38-M.]

NOTICE OF APPEAL.

To Lorraine Corporation, Defendant Herein, and to Westall & Wallace, its Attorneys of Record:

You will please take notice that Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Co., plaintiffs and appellants herein, appeal from the order entered herein on the 21st day of December, 1929, to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 17th, 1930.

FRANCIS M. TOWNSEND,
MILON J. TRUMBLE and
ALFRED J. GUTZLER,
Doing Business as TRUMBLE GAS TRAP CO.,
By LYON & LYON,
FREDERICK S. LYON,
LEONARD S. LYON,
HENRY S. RICHMOND,
FRANK L. A. GRAHAM,
Their Attorneys.

Service of the above and foregoing notice acknowledged this 18th day of January, 1930.

WESTALL and WALLACE.
By JOSEPH F. WESTALL,
Attorneys for Defendant.

[Indorsed]: Filed Jan. 20, 1930. [124]

[Title of Court and Cause—Cause No. Q.-38-M.]

ORDER ALLOWING APPEAL.

On motion of Lyon & Lyon, Frederick S. Lyon, Leonard S. Lyon, Henry S. Richmond and Frank L. A. Graham, solicitors and of counsel for plaintiffs,—

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order filed and entered herein on the 21st day of December, 1929, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

IT BEING FURTHER ORDERED that the bond on appeal be fixed in the sum of Two Hundred and Fifty ($250.00) Dollars.

Dated this 17 day of January, 1930.

WM. P. JAMES,
United States District Judge.

[Indorsed]: Filed Jan. 17, 1930. [125]

[Title of Court and Cause.—Cause No. Q.-38-M.]

STIPULATION RE ORIGINAL EXHIBITS.

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto,

through their respective attorneys, that in making up the transcript of appeal herein the Clerk of the above-entitled court make up said transcript of record in accordance with the praecipe heretofore filed by plaintiffs appellants herein, with the following additions herein set forth:

1. It is stipulated and agreed by and between the parties hereto that the exhibits attached to the bill of complaint shall be included in plaintiffs' praecipe calling for a copy of the bill of complaint.

2. That the exhibits attached to and made a part of the affidavits filed September 13, 1929, be made a part of said affidavits as called for by plaintiffs' praecipe, excepting that the physical exhibits consisting of six models filed with said affidavits shall be transmitted by said Clerk to the Clerk of the Court of Appeals to be used by the parties hereto at the hearing in the Court of Appeals.

3. That the verification of the answer of defendant be contained in the answer called for by plaintiffs' praecipe.

4. That the stipulation for the use of uncertified copies of patents, dated September 27, 1929, be included in the record of appeal. [126]

5. That the exhibits and illustrations contained in the affidavit of David G. Lorraine, filed on October 2, 1929, be included in said affidavit as called for by plaintiffs' praecipe.

6. That copies of letters patent to Shetter, No. 249,487, and Fisher, No. 1,182,873, be included in said record on appeal.

7. That memorandum of opinion rendered by Judge Bledsoe June 30, 1924, in contempt proceed-

ings involving Model 16 in cause No. E.–113—Equity, Townsend vs. Lorraine, be made a part of the record on appeal. And in that connection, it is hereby stipulated by and between the parties hereto that the Clerk is instructed to make a copy of said memorandum opinion and include the same in said record on appeal.

IT IS FURTHER STIPULATED that each of the parties hereto on the hearing on appeal may refer to and quote from any part of the record on appeal in No. 3945 in the United States Circuit Court of Appeals, and in so far as it is necessary to a full determination of this matter on appeal, said printed transcript of record in case No. 3945 shall be considered by the Court of Appeals as a part and portion of this record on appeal.

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that the Clerk of the above-entitled court shall not make the praecipe of defendant, heretofore filed on January 22, 1930, a part and portion of said record on appeal.

IT IS FURTHER STIPULATED that the Clerk of said court shall make this stipulation a part of said record on appeal.

Dated this 5th day of February, 1930.

LYON & LYON,
FREDERICK S. LYON,
LEONARD S. LYON,
HENRY S. RICHMOND,
FRANK L. A. GRAHAM,
Attorneys for Plaintiffs-Appellants.

WESTALL and WALLACE,
By JOSEPH F. WESTALL,
Attorneys for Defendant-Appellee.

The foregoing stipulation is approved, and it is so ordered.

WM. P. JAMES,
District Judge. [127]

[Indorsed]: Filed Feb. 6, 1930. [128]

[Title of Court and Cause—Cause No. Q.–38–M.]

STIPULATION RE MAKING UP OF TRANSCRIPT ON APPEAL.

WHEREAS, the blue-print Exhibit "A" to the affidavit of William McGraw is the same blue-print as Exhibit "A" to the affidavits of Milon J. Trumble, John D. Hackstaff and Ralph Foster; and

WHEREAS, the blue-print Exhibit "C" to the affidavit of Ralph Foster is the same blue-print that is Exhibit "C" to the affidavits of Milon J. Trumble and John D. Hackstaff,—

NOW, THEREFORE, it is hereby stipulated and agreed by and between the parties hereto that in making up the record on appeal, to be certified to the Clerk of the Court of Appeals for the Ninth Circuit, that only one copy of such Exhibit "A," to wit, that attached to the affidavit of William McGraw, need be certified to said Clerk of the Circuit Court of Appeals, and that the Clerk of the above-entitled court be instructed to approximately mark such Exhibit "A" to the affidavit of William

McGraw showing that said Exhibit "A" is also the same drawing as that attached to the affidavits of Milon J. Trumble, John D. Hackstaff and Ralph Foster as Exhibit "A"; and that only one copy [129] of such Exhibit "C," to wit, that attached to the affidavit of Ralph Foster, need be certified to said Clerk of the Circuit Court of Appeals, and that the Clerk of the above-entitled court be instructed to appropriately mark such Exhibit "C" to the affidavit of Ralph Foster showing that said Exhibit "C" is also the same drawing as that attached to the affidavits of Milon J. Trumble and John D. Hackstaff as Exhibit "C."

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that this stipulation be made a part of the record on appeal.

Dated at Los Angeles, California, this 13th day of February, 1930.

LYON & LYON,
FREDERICK S. LYON,
LEONARD S. LYON,
HENRY S. RICHMOND,
FRANK L. A. GRAHAM,
Attorneys for Plaintiffs.
WESTALL and WALLACE,
By JOSEPH F. WESTALL,
Attorneys for Defendant.

[Indorsed]: Filed Feb. 13, 1930. [130]

[Title of Court and Cause—Cause No. Q.-38-M.]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Company, in the city of Los Angeles, county of Los Angeles, State of California, principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Lorraine Corporation, defendant in the above styled and numbered cause, in the sum of Two Hundred and Fifty ($250.00) Dollars, lawful money of the United States, to be paid to it and its successors and assigns; to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our successors and assigns by these presents.

Executed and dated this the 14th day of January, A. D. 1930.

WHEREAS, the above-named Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Company, has prosecuted an appeal to the Honorable United States Circuit Court of Appeals for the Ninth Circuit to reverse the order denying an injunction of the [131] District Court for the Southern District of California in the above-entitled cause,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named Francis M.

Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Company, shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

ALFRED J. GUTZLER.
MILON J. TRUMBLE.
FRANCIS M. TOWNSEND.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

By VAN R. KELSEY,
Attorney-in-fact.

[Seal] Attest: LUCILE VAN BOLT,
Agent.

State of California,
County of Los Angeles,—ss.

On this 14th day of January, 1930, before me, O. B. Kemp, a notary public, in and for the county and state aforesaid, duly commissioned and sworn, personally appeared Van R. Kelsey and Lucile Van Bolt, known to me to be the persons whose names are subscribed to the foregoing instrument as the attorney-in-fact and agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as principal and their own names as attorney-in-fact and agent, respectively.

[Seal] O. B. KEMP,
Notary Public in and for the State of California, County of Los Angeles.

I hereby approve the foregoing bond dated the 17 day of Jan., 1930.

WM. P. JAMES,
Judge.

[Indorsed]: Filed Jan. 17, 1930. [132]

[Title of Court and Cause—Cause No. Q.-38-M.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Please prepare a transcript of record for the United States Circuit Court of Appeals for the Ninth Circuit upon which the appeal heretofore taken by plaintiffs from the order entered by the above-entitled court on the 21st day of December, 1929, denying plaintiffs' application for temporary injunction in the above case, shall be heard, including therein the following documents, to wit:

(1) Bill of complaint.
(2) Order to show cause why preliminary injunction should not issue.
(3) Affidavit of William McGraw, filed September 13, 1929.
(4) Affidavit of Ralph Foster, filed September 13, 1929.
(5) Affidavit of Milon J. Trumble, filed September 13, 1929.
(6) Affidavit of John D. Hackstaff, filed Sept. 13, 1929.
(7) Answer of defendant.

(8) Affidavit of T. D. Boyce, filed October 2d, 1929.

(9) Affidavit of E. P. Shaw, filed October 2d, 1929.

(10) Affidavit of David G. Lorraine, filed Oct. 2d, 1929.

(11) Notice of evidence relied upon in response to order to show cause why injunction should not issue, filed October 2d, 1929. [133]

(12) Affidavit of Alfred J. Gutzler, filed Oct. 8, 1929.

(13) Affidavit of William McGraw, filed October 8, 1929.

(14) Minute order denying plaintiffs' application for preliminary injunction, entered December 21, 1929.

(15) Opinion of Court, filed December 21, 1929.

(16) Petition for order allowing appeal.

(17) Assignments of error.

(18) Notice of appeal.

(19) Order allowing appeal.

(20) Bond on appeal.

(21) Citation.

(22) Patent in suit.

(23) This praecipe for transcript of record.

Dated this 18th day of January, 1930.

Respectfully submitted,
LYON & LYON,
FREDERICK S. LYON,
LEONARD S. LYON,
HENRY S. RICHMOND,
FRANK L. A. GRAHAM,
Attorneys for Plaintiffs.

[Indorsed]: Filed Jan. 20, 1930.

Due service and receipt of a copy of the within —— is hereby admitted this 18th day of Jan. 1930.

WESTALL & WALLACE,
By JOSEPH F. WESTALL,
Atty. for ————. [134]

[Title of Court and Cause—Cause No. Q.–38–M.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing transcript, containing pages 1 to 134, inclusive, to be the transcript on appeal in the above-entitled cause, and that the same has been compared and corrected by me and contains the original citation, and a full, true and correct copy of the original bill of complaint, order to show cause, affidavit of William McGraw, filed September 13, 1929, affidavit of Ralph Foster, affidavit of Milon J. Trumble, affidavit of John D. Hackstaff, answer, notice of evidence relied upon in response to order to show cause, affidavit of David G. Lorraine, affidavit of T. D. Boyce, affidavit of E. P. Shaw, rebuttal affidavit of Alfred J. Gutzler, rebuttal affidavit of William McGraw, filed October 8, 1929, stipulation for use of uncertified copies of patents, copies of patents Nos. 1,269,134–249,487 and 1,182,873, minute order denying plaintiffs' application for pre-

liminary injunction, memorandum opinion in case No. E.–113.—In Equity, opinion, petition for appeal, assignments of error, notice of appeal, order allowing appeal, stipulation *re* exhibits, stipulation regarding the making up of the transcript on appeal, cost bond on appeal, and praecipe for transcript of record.

I DO FURTHER CERTIFY the fees of the Clerk for copying, comparing and certifying the foregoing record on appeal amount [135] to $37.25, and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 15th day of February, in the year of our Lord one thousand nine hundred and thirty, and of our Independence the one hundred and fifty-fourth.

[Seal] R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America in and for the Southern District of California.

By Edmund L. Smith,
Chief Deputy Clerk. [136]

[Endorsed]: No. 6076. United States Circuit Court of Appeals for the Ninth Circuit. Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, Doing Business Under the Firm Name of Trumble Gas Trap Co., Appellants, vs. Lorraine Corporation, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 17, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6076.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Co.,

Appellants,

vs.

Lorraine Corporation, a corporation,

Appellee.

APPELLANTS' BRIEF.

LYON & LYON,
FREDERICK S. LYON,
LEONARD S. LYON,
FRANK L. A. GRAHAM,
HENRY S. RICHMOND,
Attorneys for Appellants.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

No. 6076.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Co.,

Appellants,

vs.

Lorraine Corporation, a corporation,

Appellee.

APPELLANTS' BRIEF.

Appellants were plaintiffs and appellee defendant in a suit involving infringement of U. S. Letters Patent No. 1,269,134 granted June 11, 1918 on an application filed November 14, 1914 for the invention of Milon J. Trumble in Crude-Petroleum and Natural-Gas Separators.

This appeal is from an order in the form of an order denying a preliminary injunction. While the form of the proceedings and the form of the order is the denial of plaintiffs' motion for a preliminary injunction restraining defendant pending suit, the decision is and was on the merits and was and is in effect a final adjudication. The decision is not based upon any controversy of facts. Believing therefore that the issues were and are fully and

finally before the Court, plaintiffs have taken this appeal and submit that the decision of the District Court is erroneous in law.

The Trumble patent has heretofore been fully litigated. It has been fully considered by this Court. (290 Fed. 54, opinion by Judge Dietrich.)

Such prior adjudication was in a suit wherein the present plaintiffs were plaintiffs and David G. Lorraine was the original defendant. While such suit was pending, said defendant David G. Lorraine sold and transferred his business of manufacturing oil and gas separators to the present defendant Lorraine Corporation which was organized for that purpose. The Bill of Complaint alleges:

> "That during the pendency of the said suit the defendant therein David G. Lorraine transferred his then existing business of manufacturing crude petroleum and natural gas separators to the defendant herein Lorraine Corporation which corporation thereupon became the successor to the said David G. Lorraine in the manufacture of crude petroleum and natural gas separators, and contributed to and participated in the defense of said suit." [Tr. Rec. p. 6, Bill of Complaint paragraph VIII.]

This is admitted in defendant's answer (paragraph VIII):

> "Admits that during the pendency of said suit the defendant therein David G. Lorraine transferred his then existing business in the manufacture of crude petroleum and natural gas separators to the defendant herein Lorraine Corporation, which corporation thereupon became the successor to the said David G. Lorraine in the manufacture of crude petroleum and natural gas separators, and continued to and participated in the defense of said suit." [Tr. Rec. bottom of page 67.]

The validity and interpretation and scope of the Trumble patent is therefore *res adjudicata* between the parties. Not only did the present defendant participate in and control the defense of the prior litigation, particularly conducting and controlling the appeal to this Court, but also defendant purchased the business of defendant David G. Lorraine, *pendente lite,* and was thereby completely bound by such adjudication. This rule of law is so well settled and this Court is so familiar therewith that plaintiffs will cite only examples of decisions illustrating such rule.

See:

Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294; 61 L. Ed. 1148;

Lenk v. Lasher-Peerblow Co., 27 Fed. (2d) 958;

Elliott Co. v. Roto Co., 242 Fed. 941 (C. C. A.);

Lyons v. Baer & Wild, 26 Fed. (2d) 599 (C. C. A.).

The original suit was decided by the District Court (283 Fed. 806, Judge Wolverton) holding the Trumble patent valid and infringed by the various oil and gas separators or "gas traps," as such devices are commonly known in the art.

This Court affirmed such decree insofar as sustaining the validity of the patent. It materially limited the scope thereof and reversed the District Court in its holding that certain of the defendant's traps were infringements.

It is clear, therefore, that the validity of the patent is not and cannot be an issue in this case. The validity of the patent is *res adjudicata.*

It is equally clear that both parties being bound by such prior adjudication (the scope of said letters patent

having been finally judicially determined in such suit as to which both of the parties here were parties), the sole question in this case must be, are the oil and gas separators or "gas traps" complained of herein infringements of said Trumble patent *within the adjudicated scope of said patent?*

Pursuant to the mandate of this Court, the District Court on August 15, 1923, entered an interlocutory decree in said original suit wherein it again affirmed and decreed the validity of said Trumble patent. Subsequently such interlocutory decree matured into a final decree, the accounting thereunder having been waived. [Tr. Rec. pp. 110-11, par. I of license agreement of April 2, 1926.]

As a result of this Court's decision (290 Fed. 54) defendant was left free to make, use and sell gas traps of the construction therein identified as "Model 2." There were two slightly variant forms of this "Model 2." These are illustrated in Defendant-Appellant's Opening Brief in said prior case (see pages 88-89 thereof). We shall hereinafter reproduce these two drawings in an insert to this brief illustrating the various gas traps produced by defendant and shall direct the Court's specific attention to the differences in construction and mode of operation found by this Court as existent between the "Model 2" constructions and the Trumble invention.

We wish now to particularly direct this Court's attention to that class of proof which speaks louder than words,—defendant's actions or conduct.

In said prior litigation defendant asserted that the so-called "Model 2" construction was superior to the Trumble invention.

In said prior litigation defendant belittled the Trumble invention to this Court, but defendant's conduct and acts since said decision amount to a demonstration of the practical value and importance of the Trumble invention. When we here say the Trumble invention we mean the Trumble invention as defined by this court in its said decision. (290 Fed. 54.)

In "Appellant's Opening Brief" in said prior case (No. 3945 in this Court) on page 14 defendant-appellant says:

> "Another error of sufficient importance to justify brief preliminary notice: In the trial court's opinion [Transcript of Record, middle of page 541], the court said: 'Utility has been abundantly proven by the success achieved by plaintiffs' device.' If this intended to imply that there is any evidence in the record tending in any degree to show that Trumble contributed anything whatever of value or utility to the art, it is, as we shall later show, clearly erroneous. So far as the evidence discloses, the device illustrated and described in the patent in suit was only useful *insofar as it incorporated means and devices long known and used in the art for identical purposes.* There is no evidence whatever in the record tending to show that any possible difference between the device of the Trumble patent and the prior art, either alone or in combination with other devices as set forth in the claims was in any respect advantageous or had any utility. The only basis of the finding of utility, therefore, was presumption—not evidence." (Italics as they appear in said brief.)

In Defendant-Appellant's Opening Brief (Case No. 3945) defendant says:

> "This method of close and fine interpretation is often necessary where there has been a *valuable contribution to the art,* which it is desired to protect, but where is the contribution of Trumble?" (Italics defendant's.)

In said defendant-appellant's reply brief in said case No. 3945 in this court, defendant states:

> "* * * the fact that the Trumble trap was of recognized value *only insofar as it incorporated devices long and well known in the prior art.*" (Italics reproduced from said brief.)

This Court held that defendant's "Tonner No. 3" trap was an infringement. Defendant asserted that it had built only one "Tonner No. 3" type trap; that that construction was inferior to "Model 2"; that the reason for abandoning the "Tonner No. 3" construction was that the "Model 2" was of superior efficiency and utility; that "Model 2" did not infringe; that it did not embody a construction as did the construction provided in the Trumble patent and as adjudicated present in the "Tonner No. 3" trap wherein means were provided for spreading out the oil and conducting the oil onto the wall of the separator. Defendant asserted that "Model 2" *"employing no element whatever performing such double function of spreading and conducting are not infringements."* (Italics that of Appellant's Opening Brief, Case No. 3945, page 69.) Notwithstanding defendant's assertions in said case that gas traps "without any element whatever performing such double function of spreading and conducting are not infringements" and were superior to the Trumble invention and to the "Tonner No. 3" construction and that the latter was abandoned because of the superiority of "Model 2."

This suit is based upon defendant's (having from necessity at last), come to a Trumble construction embodying such element for performing such double function of spreading and conducting. This after defendant had

built and tried out in actual oil well service and use at least five other constructions.

The history of these respective constructions shows defendant gradually encroaching upon the Trumble invention as interpreted by this Court. Each subsequent new form more closely embodied the Trumble inventive thought. Until at last in the devices herein complained of, defendant has produced therein an actual element performing such double function of spreading and conducting in substantially the same manner and for the same purpose and in the combination which this court has held to be the scope of the Trumble invention.

Defendant cannot now be heard to assert that the Trumble invention *"was only useful insofar as it incorporated means and devices long known and used in the art for identical purposes."* (Italics defendant's.) On the contrary the present appeal involves two of defendant's constructions which, (as we shall point out specifically), abandon entirely the defendant's early theories and constructions and use means clearly equivalent to Trumble for slowing down the incoming stream of oil and gas, (reducing velocity,) permitting partial initial separation of gas and oil by permitting initial expansion, *and* for actually not only directing but conducting and spreading the oil onto the surface of the gas-trap wall.

These two of defendant's gas trap constructions so directly charged in this suit to infringe, are identified and described in the affidavits of Milon J. Trumble [Tr. Rec. pp. 39-47, at p. 45], as Figs. 5 and 6 of "Exhibit A," and in Exhibits C and D; John D. Hackstaff [Tr. Rec. pp. 51-60, last paragraph p. 57]; and William McGraw

[Tr. Rec. pp. 16 to 25, last paragraph p. 21 to p. 24]. Pursuant to the stipulation [Tr. Rec. p. 157] and to the stipulation of February 21, 1930 (in this court), the same exhibits are referred to by each of these witnesses and printing of these exhibits or drawings in the transcript has been waived. The Clerk has prepared copies thereof under this stipulation.

This series of exhibits so covered by this stipulation also illustrates the so-called "Tonner No. 3" trap (Exhibit A to the Bill of Complaint), and seven (7) constructions of defendant's traps designed and made by defendant after this court's decision in the original case. Intervening between the "Tonner No. 3" and these seven (7) constructions were the "Model 2" constructions of the original case. These two "Model 2" constructions are substantially the same, except that the so-called bell nipple was machined off in one of such constructions and placed in closer proximity to the partition wall, against which part of the incoming stream of oil was directed. Otherwise, the two "Model 2" constructions were the same and we herein treat them as the same. This, for the reason that this court in deciding the original case treated them as the same, there being no distinction between them in view of the court's decision as to the scope of the Trumble invention.

These two "Model 2" constructions are illustrated in the exhibit drawings referred to in the affidavit of David G. Lorraine and were reproduced pursuant to said stipulation. They are also illustrated on pages 88 and 89 of defendant-appellant's opening brief in said Case 3945.

There is no controversy as to the respective constructions of these ten (10) different gas traps, so made from time to time by the defendant.

These ten different constructions completely refute defendant-appellant's original contention in said original case (No. 3945) that there was nothing new or of value in the Trumble invention. The development by defendant (Appellee herein) of its commercial product shows conclusively the necessity and demand for the incorporation into a completely successful gas trap of the Trumble invention. At the end of this brief we have inserted upon a single sheet, drawings illustrative of defendant's ten gas trap constructions.

Very shortly after the decision of this court in said original case, defendant showed that it was not satisfied with the so-called "Model 2" gas trap construction. It is a dependable inference that such construction was not satisfactory. This, because defendant abandoned the "Model 2" construction and then devised what is here known as "Model 16." (The record does not show, and we are unable to state whether there intervened between the "Model 2" construction and "Model 16" construction, thirteen (13) other gas trap constructions made by defendant. If so, the litigation does not disclose what their variations were. The most we know is that such other thirteen variations were not the subject of litigation between the parties.)

When defendant brought out said "Model 16" construction, appellant believed it to be a violation of the injunction of the original case, under the interpretation and

scope given the Trumble invention by this Court. Appellants therefore moved in the District Court for an order in civil contempt adjudging defendant in contempt. This motion was heard by the then Judge Benjamin F. Bledsoe. Judge Bledsoe dismissed the contempt proceedings, saying:

> "This model was not a colorable adaptation of either of the models held to be infringments by Judge Wolverton," etc.
>
> * * * * * * * * *
>
> "Without indicating any opinion as to whether or not Model 16 is an infringement of the patent as construed by the Circuit Court of Appeals, 290 Federal 54, at page 59, I am constrained to hold that it was not a violation of the injunction of Judge Wolverton, and that therefore the proceedings in contempt should be dismissed." [Tr. Rec. pp. 142-143.]

Subsequently, plaintiffs applied for and secured leave in said original suit to file a supplemental bill of complaint, alleging in said suit infringement by said "Model 16." At that time the decree in said original suit was interlocutory, the accounting order having not been completed.

Thereafter, said litigation was settled and a final decree therein entered waiving the accounting and maintaining only the original injunction in force and effect. This was by a compromise and settlement. It is reflected in the agreement of April 2, 1926, between David G. Lorraine, and the Lorraine Corporation (defendant herein) as first parties, and plaintiffs as second parties. [See Tr. Rec. pp. 109 to 112.]

As a part of such settlement agreement, these plaintiffs granted to the defendant-appellee herein a limited

license under the Trumble patent in suit. [See Exhibit A to the Bill of Complaint, Tr. Rec. pp. 11 to 12.] The two drawings referred to in this license agreement illustrate the so-called "Tonner No. 3" and "Model 16" traps, respectively. Defendant was thereby licensed under the Trumble patent to make these two constructions. (Certain settlements of other litigation also attended this settlement of April 2nd, 1926. We will not refer in detail thereto, as they have no bearing upon the validity, scope or infringement of the Trumble patent.)

But, defendant found "Model 16" construction unsatisfactory. We shall hereafter refer to the reasons underlying defendant's contention that "Model 16" does not infringe. Let us first consider the continuous trend of defendant's activities toward a more and more complete adoption and use of the Trumble invention as its scope is defined by this Court in its previous decision.

Not satisfied with "Model 16," defendant thereafter made six (6) more gas trap constructions. It is the last two of these, referred to as Figs. 5 and 6 of Exhibit A to plaintiff-appellee's said moving affidavits, which are directly charged to infringe. An examination of these step-by-step changes of construction shows a continuous approach closer and closer to the specific construction of the Trumble patent. They show the necessity experienced by defendant of appropriating the whole of the Trumble invention to have a satisfactory commercial gas trap.

This court held the "Tonner No. 3" construction to infringe. It is believed that the full reasons therefor are clearly set forth in that portion of this court's opinion commencing with paragraph (2) on page 59 of 290 Fed-

eral. If the court will refer to the illustrative sheet of drawings inserted at the end of this brief, there will be found the drawing of "Tonner No. 3" produced by defendant in the prior litigation. It is to be noted that the main cylindrical chamber of the gas trap is divided into two main portions by the vertical partition 2. The chamber at the right of this partition is again divided into two operative chambers by the deflector or baffle plate 3. That portion of the chamber above the baffle plate forms an initial expansion chamber; the oil from the inlet 4 "spreads approximately the whole body of oil in an unbroken condition to the adjacent segment of the chamber wall, down which it flows substantially as in the Trumble device." (290 Fed. bottom p. 59.) The court held this baffle plate 3 the equivalent of the Trumble cone. The "Model 2" construction substituted for the baffle plate 3 of "Tonner No. 3" only a down-turned pipe nipple. This is exemplified in the second and third drawings by the numeral 4. The sole difference between the two constructions of "Model 2" was that in one the nipple was arranged in the center of the chamber between the main wall 1 of the trap and the partition 2. In the other "Model 2" construction a portion of the nipple was machined off so that it could be brought into close contact with the partition 2. This construction the court held did not infringe, because it did not contain the mechanical element or means of the Trumble combination, i. e., the baffle plate or distributing means by which the oil was distributed and directed onto the wall of the trap. But, on the contrary, with this "Model 2" construction—

> " * * the incoming stream is broken up by * * * the bell-shaped nipple, and in part splashed against the chamber wall and partition, the other part

> falling free into the settling pool. Some of the portion striking the partition plate and chamber walls doubtless flow down the surfaces to the pool below, and, so flowing in a sort of a sheet, is suggestive of the Trumble process. But the filming is only slight and incidental, and apparently these features of appellant's apparatus are primarily designed to get the requisite exposure for the escape of gas, by dividing the body of the froth into drops and splashes and streamlets, rather than by spreading it as a sheet or film on a solid backing, and also to guard the settling pool against direct discharge into it of the incoming stream at a high velocity, causing violent agitation and interfering with the separation, by gravitation, of the sand and water from the oil." (Opinion of Court, 290 Fed. top of page 56.)

This court, after this explanation of said "Model 2" construction, says:

> "Our conclusion is that, in the light of the prior art and the patentee's interpretation of his claims in the Patent Office, the claims are to be read only upon apparatus by which substantially the whole body of oil is spread as a film or thin sheet on a backing wall, and is not, in the course of the process of separation, broken up by any means into drops or streamlets; and, if so read, they do not reach the structure exhibited in the drawings of appellant's patent or in the model identified by the bell-shaped discharge nipple." (Opinion of Court, 290 Fed. page 59.)

This court was persuaded to this decision by defendant's contention that with the "Model 2" there was no delivery of the oil onto the wall of the trap in the sense of the Trumble patent; this is reflected in the court's statement that the main operation of the "Model 2" was the dropping of the oil to the settling pool in "drops and splashes and streamlets,"—"the filming is only slight and

incidental." (Page 56 of 290 Fed.) In this connection we remind the court that in appellant's opening brief, under the caption "Defendant's Model 2 does not infringe" on page 90, defendant says:

> "It would seem obvious that the oil coming through the inlet opening 4 *must* in large part fall to the bottom of the separator without striking the walls at all. Indeed, the trial court distinctly so found, stating [near the top of page 538 of the transcript of record] that part of the oil descends 'by gravity *without reaching either wall.*'" (Italics defendant's.)

This is further borne out by further consideration of appellant's said opening brief in the said case 3945. Defendant had been arguing that the "Model 2" construction did not contain any means (i. e., a spreading cone, baffle or its equivalent) and therefore did not infringe. Defendant on page 94 of said brief says:

> "We, therefore, turn to the specification and drawings of Trumble, as well as to his file wrapper contents, to discover what the parties to this patent contract meant when they used the language 'means to distribute the oil over the wall of the chamber,' etc. We have seen that Trumble defines this 'means' very specifically, in connection with the statement of what he supposed he actually added to the art, as 'an imperforate baffle-plate adapted to spread the whole body of oil to the outer edge of the vessel,' i. e., *distribute the oil equally around and over all the walls of the chamber.* Manifestly, there is no such element in defendant's Model No. 2. This element is described as being *within* the chamber. The oil does not reach the chamber until it is discharged from the opening in the so-called bell-shaped nipple, and upon entering into the chamber falls in large part to the bottom of the chamber, only incidentally striking or splashing on the walls. We, therefore, submit that defendant's Model No. 2, either with the so-called nip-

ple set against the partition or away from the partition, does not infringe." (Italics defendant's.)

The fourth view or drawing of this insert is of the type or "Model 16," produced by defendant after this court's said decision, and which was the subject of the civil contempt proceedings. This is the construction that Judge Bledsoe held "was not a colorable adaptation," and reserved any opinion as to infringement. In this Model 16 construction the partition comparable to the partition 2 of the "Tonner No. 3" and "Model No. 2" constructions was used. Defendant abandoned the use of the baffle 3 of the "Tonner No. 3" and abandoned the use of the nipple 4 of the "Model No. 2." In the chamber formed between the outer wall of the gas trap and the said partition there was formed a tight or closed box 3 open only at its bottom. Into this box extended the inlet nozzle 1 which was in the form of a 6-inch nipple. This nipple was cut away as indicated at 2 in the drawing; the incoming oil was discharged into this box from the cutaway portion 2 of the nipple. The only outlet from this box was through the bottom openings 4 of the box 3; the oil dropped directly from these openings 4 into the body of oil in the trap.

The fifth drawing of this insert series of illustrations illustrates the next form of construction produced and experimented with by the defendant corporation after the grant of the license on April 2, 1926. [Tr. Rec. p. 11.] This construction is referred to as Fig, 1, Exhibit A, and described in detail in the affidavits of McGraw [Tr. p. 33], Trumble [Tr. p. 39], Hackstaff [Tr. p. 51]. It is noted that defendant abandons the use of a partition like the partition 2 of the former gas traps. It provides

only a closed passageway or trough or conduit which is closed at top, sides and bottom; the inlet is from the side of the trap into this passageway or conduit; the outlet is at the open end of the passageway; the closed conduit or passageway is arranged horizontally. The fact that defendant after constructing this trap discarded it, raises a strong inference against its commercial practicability. It is to be noted that this construction did not embody any baffle means by which the oil was delivered onto or spread on the trap wall,—comparable to the baffle of "Tonner No. 3" or Trumble's cone. The proofs show that such cone or baffle means is the element which makes "gas traps" commercially successful.

The sixth drawing of this insert series is Fig. 2 of Exhibit A of the affidavit of McGraw, et al. It is marked "2-A". See affidavit of McGraw Trans. Rec. last paragraph p. 17 and Trumble Trans. Rec. p. 42. In this device of Fig. 2 the oil from the well is delivered to the inside of the separator into a chamber formed vertically between a vertically extending plate or wall (indicated in the upper figure by dotted lines) and the wall of the trap or separator. The gas and entrained oil rises from such chamber upwardly through a nipple into a circular enclosed passageway or conduit which is arranged above the oil and gas inlet. This circular conduit extends around the inside of the separator or trap wall. The lower surface or bottom of such conduit beyond the vertically extending wall is formed with an annular slot between such bottom of the conduit and the inner surface of the trap wall, whereby the accumulated oil in the conduit is discharged against the inner wall of the separator and flows downwardly thereover, the gas passing downwardly

through the annular slot thus formed and passing upwardly to the top of the trap, from which it is discharged. Evidently this type was not successful and thereafter defendant made and tried out the type and construction of trap shown in the next succeeding drawing of this series, marked "Fig. 3" and "3-A".

The trap of said Fig. 3 is described in the affidavits of McGraw [Trans. Rec. p. 18] and Trumble [Trans. Rec. p. 43.] With this form and construction of defendant's trap the enclosed circular trough or conduit is used but such trough is arranged helically extending from the inlet downward. The inlet of the oil and gas is from the trap directly into this trough or conduit, the conduit is closed at the sides and top and the discharge is from the open end of the conduit. A series of openings were provided in the bottom of the conduit along the inner surface of the gas trap wall, as indicated in dotted lines in the top view of Fig. 3. This construction was not successful. It was unsatisfactory, for we find defendant trying another experiment—Fig. 4.

The eighth drawing of this series insert (Fig. 4) illustrates another experimental form constructed by defendant. This form is explained in the affidavit of McGraw [Trans. Rec. p. 19] and Trumble [Trans. Rec. p. 43.] This form is similar to Fig. 1 of this series except that the circular trough extends entirely around the inner wall of the shell and is arranged helically so that the outlet end of the trough is directly underneath the inlet. The trough is closed at the top, side and bottom with the exception that the bottom wall is discontinued at a point approximately three-fourths of the distance around the separator from the inlet opening, the bottom from such

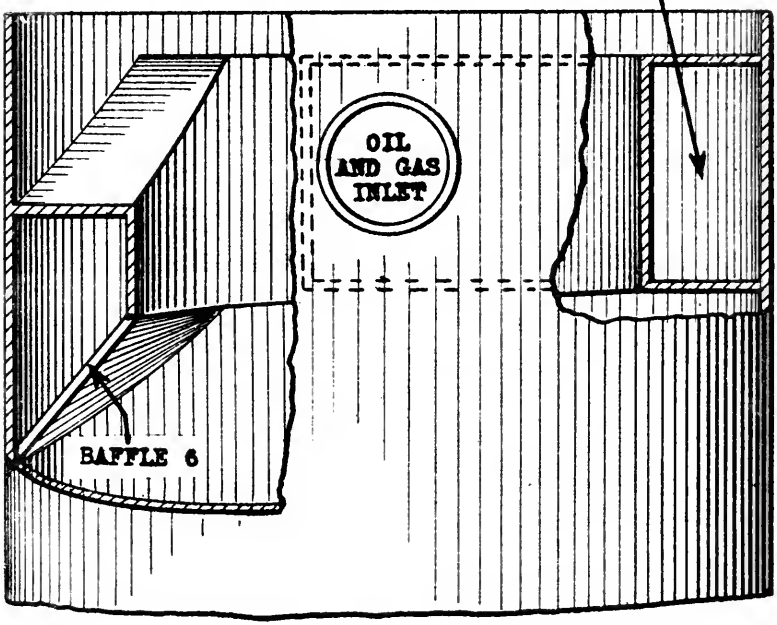
point to the discharge or open end of the trough being open. This construction was another unsuccessful experiment. After it, we find defendant designing and constructing the traps which infringe and upon which this suit is based.

After this period of development commencing with "Tonner No. 3", producing the non-infringing "Model 2", the licensed "Model 16" and the unsatisfactory experimental traps Fig. 1, Fig. 2, Fig. 3 and Fig. 4, defendant produced another trap. Two slight differences of construction of this final trap are illustrated in the ninth and tenth drawings of this series. They are marked "Fig. 5" and "Fig. 6" respectively. These are the traps that have because of their reappropriation of the Trumble invention been defendant's final success.

These traps of Figs. 5 and 6 are explained in the affidavits of McGraw [Tr. Rec. pp. 20-22]; Trumble [Tr. Rec. pp. 43-44], and Hackstaff [Tr. Rec. bottom page 54 and commencing with last paragraph p. 57.] In these two forms of gas trap an enclosed conduit is used. This conduit extends around the inner surface of the trap. It is closed at the top, inner side and bottom. The other side wall or surface is formed by the wall of the trap. The inlet of oil is from the outside of the trap into this conduit. This conduit forms an expansion chamber by means of which the velocity of the incoming stream of oil is slowed down and quiescence secured enabling initial separation of the gas from the oil. The outlet from this enclosed chamber or trough is by means of a baffle or spreading directing plate 6. The two forms of Fig. 5 and 6 differ only as to the mechanical means of connecting the baffle or distributing plate 6 to the

DEFENDANT'S FIG. 6 TRAP
See Model
EXHIBIT A-6

ENCLOSED TROUGH FORMING EXPANSION CHAMBER REDUCING VELOCITY, AND SECURING QUIESCENCE. ALL THE OIL IS THROWN ONTO THE INNER CURVED SURFACE OF THE TRAP WALL WHICH FORMS THE OUTSIDE WALL OF THIS TROUGH.



conduit or trough. In Fig. 5 two pieces of metal are used and joined together to make a continuous surface while in the construction of Fig. 6 only one piece of metal is used. The effect is practically the same. It is to be noted that the baffle 6 does not conform to the bottom of the trough or conduit. It is not only directed slightly downwardly but it is directed downwardly and inwardly toward the wall of the trap, assuring all of the oil passing downwardly toward and against the inner curved surface of the trap wall. In normal operation all or at least substantially all of the oil is thereby not only directed toward but actually brought onto and distributed onto the inner surface of the trap wall and thereby spread out in the same manner as in the Trumble patent embodiment of the Trumble invention and in the "Tonner No. 3" infringement.

In addition to the drawings there are in evidence forming part of the record herein two small sheet-iron models marked Exhibits A-5 and A-6, respectively, to the affidavit of William McGraw. By reference to these the slight difference between traps and the construction of Figs. 5 and 6 will be apparent. We have inserted opposite this page a drawing which is illustrative of this type or construction of gas trap. This drawing illustrates the relation of the downwardly positioned baffle 6 which is inclined toward the curved inner surface of the outer wall of the gas trap and forms a tight joint with such wall.

The enclosed trough of this construction is to slow down the velocity of the gas and oil entering the trap and to deliver substantially all of the oil onto the inner wall of the trap. In order to insure this final result,

defendant has adopted and used an inclined spreading and directing surface formed by the baffle 6. This corresponds to the baffle 3 of "Tonner No. 3" and to the cone of the drawing of the Trumble patent. This baffle is not spaced away from the wall as was the edge or end of the baffle 3 of the "Tonner No. 3" trap, of which this court said:

> "Possibly, as contended by appellant, the partition is less instead of more than one-third of the distance from the wall; but the precise location is not highly material. The baffle plate is thought to be the equivalent of the Trumble cone, and spreads approximately the whole body of the oil in an unbroken condition to the adjacent segment of the chamber wall, down which it flows substantially as in the Trumble device." (290 Fed. bottom of page 59.)

With this type Fig. 5 or Fig. 6 construction, the pipe carrying the oil from the oil well to the trap is of much smaller cross-sectional area than the enclosed trough or conduit in the trap into which the pipe delivers the intermingled gas and oil. Therefore, when the gas and oil from the well enter this trough the mixed oil and gas is allowed to expand and the velocity thereof is reduced. This trough being circular and fastened to the circular inner wall of the gas trap, the oil is thrown to the outside of the trough, *i.e.*, the inner surface of the wall of the gas trap. Therefore, when it leaves the trough it is projected onto the inner surface of this curved wall of the trap. The delivery end of the trough terminates also in the baffle 6, which is an extended spreading surface and serves also to direct any oil, not carried along on the inner surface of the wall of the trap, onto such wall. The delivery end of the trough, as formed by this baffle 6, is several inches lower than the end of the trough where

the gas and oil enter. The baffle 6 forms a spreading and directing surface in continuation of the surface of the trough, which baffle surface direct any oil thereon to and delivers such oil onto the inner surface of the separator, where all oil flows down in a relatively thin film or body. The oil in this trap does not pour out of the end of the trough in drops or streamlets without touching the wall of the separator, as in "Model 2".

In this Fig. 5 or Fig. 6 gas trap construction the cross-sectional area of the closed trough is such that the velocity of the incoming oil and gas is slowed down, the turbulence is thereby materially lessened and the requisite quiesence given to the oil and gas, the free gas immediately rising to the top of the trough. As the trough corresponds to the arc of the circle of the gas trap wall, the oil due to its velocity is thrown onto the curved inner surface or wall of the trap. Such oil as reaches the end of the trough on the bottom thereof is directed and conducted by the baffle 6 onto the curved inner surface of the wall from the trap. It is thus seen that all or substantially all of the oil is spread onto the inner surface of the wall of the trap. Essentially, it is in a relatively thin film and flows essentially quiescently down the wall into the body of oil in the bottom of the separator. While the oil is flowing down such inner surface of the separator wall (as a backing wall), the gas freed from such downwardly flowing film of oil escapes toward the center of the "gas trap" and rises to the upper portion thereof. By the construction of this trough with the deflector plate or baffle 6 at the delivery end guiding and directing the flow of oil onto the curved inner surface of the tank wall, it is highly improbable,

if not impossible, for any substantial portion of the oil to drop from the end of the trough directly into the body of oil in the separator and in drops or streamlets, as Judge James in his opinion has assumed might take place.

We respectfully submit that to arrive at this conclusion Judge James evidently considered the bottom of the trough as horizontal at the discharge end and had in mind that the wall of the separator was flat and not curved.

We thus see that the enclosed trough in these Fig. 5 and 6 traps forms an initial expansion and separation chamber, and the surfaces of such trough, being positioned as they are, form mechanical means for delivering the oil directly onto the inner curved surface of the trap wall. That defendant in order to insure all or substantially all of the oil being delivered onto such inner curved surface has provided at the end of the trough a mechanical means (*i.e.*, the baffle 6) to direct, conduct and spread the oil onto the inner surface of the wall of such chamber to flow downwardly thereover (as expressed in claim 1 and as construed by this court in 290 Fed. 54). We thus see that the baffle plate 6 in combination with the particular formation of the enclosed trough performs the full and complete function of the baffle 3 of "Tonner No. 3" and of the cone of the Trumble patent drawings. These inter-related mechanical means thus perform the same function in substantially the same manner and accomplish substantially the same result of delivering substantially all of the oil onto the inner surface of the separator as a backing wall and in a relatively thin film as interpreted by this court in its previous decision.

We respectfully submit that Judge James has erred in his interpretation of the decision of this court as to the scope of the Trumble invention. The "Model 2" trap was utterly devoid of any mechanical means constituting an equivalent for the cone of the Trumble patent or the baffle 3 of the "Tonner No. 3" construction. In Figs. 5 and 6 constructions defendant has not only used the formation of the enclosed trough as a mechanical means for spreading the oil onto the inner curved surface of the wall of the trap, but has provided the additional spreading and directing means of the baffle termination 6 of the trough, to insure that if any oil is flowing on the flat bottom of the trough, that it will, before being discharged therefrom, flow over the angularly disposed baffle and change its course toward and finally be discharged upon the wall of the trap. It is this baffle or angularly disposed plate at the discharge end of the trough that distinguishes the form shown in Fig. 5 and Fig. 6 from that shown in Fig. 4 wherein the outlet or discharge end of the trough is horizontally disposed, and it is this additional spreading means which Lorraine recognized as necessary to use that accomplishes the purpose and object of the Trumble cone and results in insuring that the oil will be spread on the inner wall of the gas trap. It is believed that the function and mode of operation thereby intended to be and actually secured, is evident; we submit that this construction is to be viewed in the light of defendant's many unsuccessful experiments with constructions not embodying such obvious dependence upon complete direction and delivery of all of the oil onto the wall of the trap in a quiescent condition, down which it flows in a relatively thin film.

It is obvious that with the type Fig. 5 or 6 construction defendant does not intend to and does not in mechanical fact depend upon any major portion or a material portion of the oil being delivered into the bottom of the tank in drops or streamlets; on the contrary, judging defendant's intentions and the results secured by defendant by the mechanical means used and the mechanical evidence existent from the various experimental types produced by defendant, the conclusion irresistibly follows that the success of the defendant's Fig. 5 and/or 6 traps is due to such traps incorporating the inventive idea which this court has recognized, and that such traps infringe. This, without any extension whatever of the scope of the Trumble invention beyond that heretofore adjudicated by this court.

In the opinion of the lower court Judge James has described two hypothetical forms of gas traps, which were not before the court, as examples of forms of traps which would not infringe the Trumble patent. [See last paragraph of page 145 of the Record.] With respect to the first of these traps the court stated that the "oil would be directly projected against the wall of the shell, so that it formed approximately a continuous film, which would flow down the surface" and with respect to the second trap stated "the whole effect being to cause the oil to run down the inner surface of the shell in a more or less continuous sheet." These illustrations by the court of non-infringing forms of gas traps is followed by the following statement:

> "These illustrations serve to emphasize the fact that it is the *form of apparatus* that gives to the Trumble device its distinction and novelty." (Italics ours.)

Judge James in arriving at his conclusions shows clearly that he was concerned with form whereas this court, as shown by its opinion, considered the matter in substance. Judge James took the "form" shown by Towner #3 as the measure for determining whether the present Lorraine type as shown in Figs. 5 and 6 infringed the Trumble patent and lost sight of the fact that this court defined the scope of the claims in substance as including "an apparatus by which substantially the whole body of oil is spread as a film or thin sheet on a backing wall, and is not, in the course of the process of separation, broken up by any means into drops or streamlets;" and only pointed out that as an example the Towner #3 came within its definition of the scope of the Trumble invention. Had Judge James used the definition of the scope of the Trumble invention as defined by this court and as stated above defendants' traps Figs. 5 and 6 would be found to come squarely within the scope of the Trumble invention as defined by this court.

It is well settled law that "one does not escape liability for infringement by changing the form of dimensions of the parts of a patented combination, where such change does not break up or essentially vary the principle or mode of operation pervading the original invention."

Dowagiac Co. v. Superior Drill Co., 115 Fed. 886-904;

citing:

Cochrane v. Deener, 94 U. S. 787;
Morey v. Lockwood, 8 Wall. 230;
Elizabeth v. Paving Co., 97 U. S. 126;
Loom Co. v. Higgins, 105 U. S. 585;
Nat'l Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 F. 693.

It is not necessary, in view of the pleadings and of the prior adjudication of the validity and scope of the Trumble patent and invention, for plaintiffs to rely in this case upon the estoppel by license which bars defendant from asserting invalidity of the Trumble patent, even if that were a litigable issue in this suit. It is a fact that defendant is a licensee of the plaintiffs under the Trumble patent in suit; it retains such license and is limited by the terms thereof; it cannot, while retaining such license, be heard to dispute the validity of the patent.

McLaren Products Co. v. Cone Co., 7 Fed. (2d) 120;

Chadeloid Chemical Co. v. Charles McAdams Co., 298 Fed. 713.

While it is a fact that this case is before this court upon an appeal from a motion for a temporary injunction, it is also a fact that the patent in suit has been sustained against all defenses which are now raised against it, and that by a decision of this Court of Appeals of the 9th Circuit. Without regard, therefore, to the question of *res adjudicata,* this is a proper case for an injunction. (*Kings County Raisin and Fruit Co. v. U. S. Consolidated Seeded Raisin Co.*, 182 Fed. 59 (C. C. A. 9th Cir.).) The decision of Judge James is upon the merits; there is no issue of fact yet to be tried. But, it is also obvious that the grounds of Judge James' decision are not affected by any issue of fact that is to be determined. Judge James' decision is not predicated upon any issue of fact. Both parties submitted the case in the court below for a decision on the merits of the controversy, to avoid any further expense. It is submitted that the

record is sufficient to enable and justify this court's rendering such a decision. It is necessary in view of Judge James' interpretation of the prior decision of this court that this court shall consider the case upon its merits.

Plaintiffs respectfully submit that the gas traps of Fig. 5 and Fig. 6 construction are infringements of claims 1, 2, 3 and 4 of the Trumble patent, as the same have been construed by this court in its previous decision.

We refrain herein from discussing any of the prior art, believing that it is wholly unnecessary to burden the court therewith in view of this court's previous consideration thereof, and of its conclusions. Plaintiffs respectfully submit that the order appealed from, denying the injunction as prayed, be reversed and the cause remanded with instructions to grant such injunction.

Respectfully submitted,

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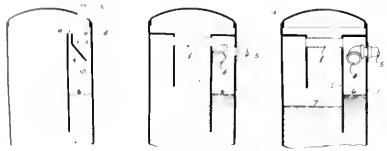
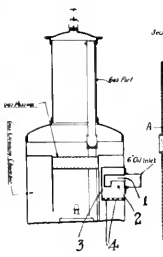
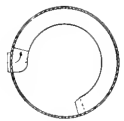
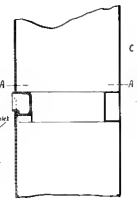
FREDERICK S. LYON,
LEONARD S. LYON,
FRANK L. A. GRAHAM,
HENRY S. RICHMOND,
Attorneys for Appellants.



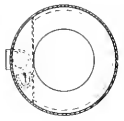


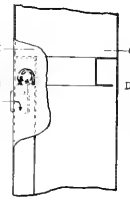




A-1

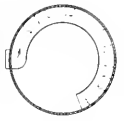
FIG. 1

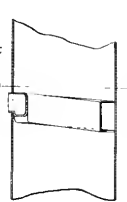




A-2

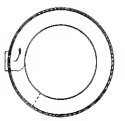
FIG. 2

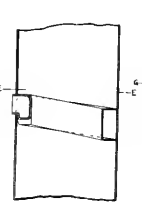




A-3

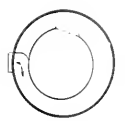
FIG. 3

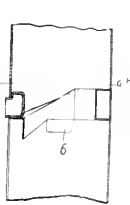




A-4

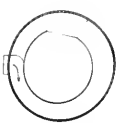
FIG. 4

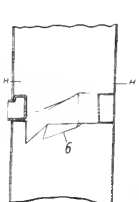




A-5

FIG. 5





A-6

FIG. 6

No. 6076.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Co.,

Appellants,

vs.

Lorraine Corporation, a corporation,

Appellee.

APPELLEE'S BRIEF.

WESTALL AND WALLACE,
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Parker, Stone & Baird Co., Law Printers, Los Angeles.

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No. 6076.

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Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Co.,

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Appellee.

APPELLEE'S BRIEF.

Appellants Are Incorrect in Referring to the Order Appealed From as in Effect a "Final Adjudication."

This is an appeal in a patent suit from an order of the District Court at Los Angeles (Judge James) refusing to grant a preliminary injunction. [Opinion of the Court, R. 143.]

As an apparent bid for relaxation of the rule that the grant or denial of a preliminary injunction is largely discretionary with the trial court and should not be disturbed except for a clear abuse of discretion, appellants

on the first page of their brief urge that the decision appealed from is in effect a "final adjudication." Being only the denial of a harsh and dangerous provisional remedy—one which if improvidently granted may do great and irreparable injury to a defendant,—it is obvious that appellants are incorrect in such assertion of finality. What they mean is that the ground of non-infringement upon which the denial of injunction is based, going as it does to the merits, greatly discourages the further proceeding of a trial; and what appellants really desire to accomplish by this appeal is a reversal of the expressed grounds of the court's opinion rather than a reversal of the order appealed from itself.

We are sure that the grounds assigned by Judge James for his decision will be found correct, and, obviously, they are more than sufficient. The large interests jeopardized required a very thorough presentation before Judge James, and the matter was submitted after extensive oral arguments upon printed briefs. The grounds of Judge James' opinion were especially urged by us as a short-cut to the conclusion of what we believe will be recognized by this court as a most glaringly unwarranted suit. If the expressed conclusions of the trial court are adopted and approved by Your Honors there will be nothing further in this suit to litigate, and we shall invoke the power of this court to direct a dismissal upon affirmance of the order appealed from.

It will be later seen, however, that defendant relies upon other equally strong defenses going to the merits, not referred to in the opinion accompanying the order appealed from; as well, also, upon several of what we believe will be recognized as conclusive bars to a preliminary injunc-

tion, such, for instance, as laches for over a year after knowledge of certain of the acts of defendant complained of before instituting suit and making application for injunction; uncontroverted facts establishing even on plaintiffs' theory a most trifling trespass—only two alleged infringements, and those (the subject-matter relating as it does to parts within a closed receptacle) concealed from the public (no threats to continue) *out of thousands of quite similar devices made and sold by defendant and admittedly not infringements,* and upon which defendant's business in the manufacture and sale of such devices aggregating approximately $67,000.00 per month (the largest business of this kind in the world), has been built up after many years of effort, together with clear and uncontroverted evidence of financial responsibility of defendant to respond in any possible amount of damages which might ultimately be decreed if the charge of the complaint should be finally sustained.

To reverse the order, therefore, requires a finding of gross insufficiency (abuse of discretion), not only of the grounds expressed in Judge James' opinion, but of all other defenses above briefly outlined.

ONLY FOR MANIFEST ABUSE OF DISCRETION SHOULD THE REFUSAL OF THE TRIAL COURT TO GRANT THE DANGEROUS REMEDY OF PROVISIONAL INJUNCTION BE DISTURBED.

The grant or denial of a preliminary injunction is established by a long line of decisions to be discretionary with the trial court, and not subject to disturbance on appeal except for a clear abuse.

The presumption, of course, is in favor of the trial court's decision: and appellants' burden consists not

merely of raising a possible doubt as to the correctness of the grounds assigned by the trial court, but that of convincing this court that there is no support for the wide discretion exercised in the denial of the writ.

This court (Judges Gilbert, Hunt and Rudkin) in the case of *Owen v. Perkins Oil Well Cementing Company,* No. 4275, by its decision rendered November 10, 1924, and reported 2 F. (2d) 247, quoted approvingly the language of the Court of Appeals for the 8th Circuit in *American Grain Separator Company et al. v. Twin City Separator Company,* 202 Fed. 202, as follows:

> "The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and, where that court has not departed from the rules and principles of equity established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that it abused its discretion. The question is not whether or not the appellate court would have made or would not have made the order. It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the power to grant or dissolve such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the court below?"

Your Honors also adopted in the Owen case, *supra,* by its quotation, the law as stated by the Circuit Court of Appeals of the 7th Circuit in the case *City of Chicago v. Fox Film Corporation,* 251 F. 883, as follows:

> "A *pendente lite* injunctional order will not be reversed unless there was an abuse of discretion; and this can only appear from an obvious misunderstanding of the facts or a palpable misapplication of well-settled rules of law on the part of the trial judge."

Of course, if there is any ground upon which the trial court's decision might properly have been based there is no abuse of discretion. Even disagreement with the trial court's views on one of the defenses going to the merits will not establish an abuse of discretion.

In the case of *Stearns-Roger Mfg. Co. v. Brown,* 114 Fed. 939, the Circuit Court of Appeals for the 8th Circuit said:

> "The primary question on an appeal from an order granting a temporary injunction is whether or not the injunction evidences an error in the exercise of its sound judicial discretion by the court which issued it. There are established legal principles for the guidance of that discretion, and where they are violated the action of the court below should be corrected. But, unless there is a plain disregard of some of the settled rules of equity which govern the issue of injunctions, the orders of the courts below on this subject should not be disturbed. The law has placed upon these courts the duty to exercise this discretion. It has imposed upon them the responsibility of its exercise wisely, and has left them much latitude for action within the rules which should guide them; and, if there has been no violation of those rules, an appellate court ought not to interfere with the results of the exercise of their discretion. The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the wide latitude permitted them, and violated the rules of law which should have guided their action."

The cases are very numerous in recognizing and applying the law under discussion and it will be sufficient merely to call Your Honor's attention in conclusion under this head, to the decision of this court in *Kings County Raisin and Fruit Company v. United States Consolidated Raisin Company,* 182 Fed. 59, where it was said:

> "The granting or refusing of a preliminary injunction in such a suit ordinarily rests in the sound discretion of the trial court, and the review thereof by an appellate court is limited to the inquiry whether there was abuse of discretion in granting the writ. This rule has been so often applied by this court, and is so well established by precedent, as to require the citation of no authorities. It is sufficient to refer to the language of Judge Jackson in Blount v. Societe Anonyme du Filtre Chamberland Systeme Pasteur *et al.,* 53 Fed. 98, 3 C. C. A. 455.
>
> "The object and purpose of a preliminary injunction is to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined upon strictly legal proofs and according to the course and principles of courts of equity. The prerequisites to the allowance and issuance of such injunction are that the party applying for the same must generally present a clear title, or one free from reasonable doubt, and set forth acts done or threatened by the defendant which will seriously or irreparably injure his rights under such title unless restrained."

See, also, the decision of this court in

Jensen Can-Filling Machine Co. v. Norton, 64 Fed. 662, 12 C. C. A. 608, and

Southern Pacific Co. v. Earl, 82 Fed. 690, 27 C. C. A. 185.

SEVERAL BARS TO PRELIMINARY INJUNCTION WHICH, WE URGE, AUTHORIZE AFFIRMANCE OF THE ORDER APPEALED FROM WITHOUT THE NECESSITY OF PASSING UPON THE MERITS.

There is no showing of possible or prospective irreparable injury: even on plaintiffs' theory the allegad trespass is insignificant—Two devices only out of thousands of quite similar character admittedly not infringements made over a period of seven years.

Gas traps are large contrivances selling at prices ranging from $450.00 to $2350.00, easily kept track of on any possible accounting.

The charge of infringement relates only to the angle of a baffle plate concealed within the trap where the chances are a thousand to one that the purchaser will ever know of it.

There is no attack upon the financial responsibility of defendant; on the contrary, positive evidence that defendant is financially able to respond in any possible amount of damages is not controverted.

Plaintiffs waited long after knowledge of alleged infringement before filing the complaint. If they were not irreparably injured by their own voluntary delay, it is reasonable to suppose that a further time to permit of an orderly trial in this case will not result in any injury that cannot be adequately redressed by an award of damages.

In a decision by former Judge Bledsoe in the case of *Martin Iron Works v. W. A. Waterman,* B-87 Equity,

in the United States District Court at Los Angeles, in denying a motion for preliminary injunction the court said:

> "The use of injunction in advance of a hearing on the merits is to be justified and to be taken advantage of only in the face of a *tremendous exigency,* an *extraordinary event,* an *obvious* injustice to accrue if something is not done immediately * * *. In a patent case an injunction prior to hearing is granted only where the court *is persuaded from a very obvious inspection of the devices in controversy* * * * that the injunctional arm of the court must be used * * *." (Italics ours.)

In the case of *Standard Elevator Company v. Crane Elevator Company,* 56 Fed. 718, a decision by the Circuit Court of Appeals for the Seventh Circuit (Judges Gresham, Woods and Jenkins) the court near the bottom of page 19 said:

> "The object of the provisional remedy is preventative largely and it will not be granted if it is more likely to produce than to prevent irreparable mischief. If the controversy between the parties be substantial and not as to the alleged infringer colorable merely, courts of equity are not disposed to adjudicate upon the rights of parties otherwise than according to the approved usages of chancery when the defendant's rights might by the issuance of a writ of injunction be put in great jeopardy—and the complainant can be compensated in damages."

The application for preliminary injunction in the case at bar was originally based upon the manufacture by defendant of only six gas traps, each characterized by having a covered trough-like extension of the oil and gas inlet pipe, which trough extended spirally around the inner surface of the shell, as illustrated in Figs 1 to 6, inclusive,

of the blue-print Exhibit A to the affidavit of William McGraw (which affidavit is found beginning R. 16, and which blue-print exhibit is found somewhere in the five copies of various exhibits filed on behalf of plaintiff under stipulation dispensing with their printing; but to the exact location of which we cannot definitely refer for want of the service of a copy). Later photostats in this brief, however, will remove any doubt as to construction.

On the hearing, however, the charge *as to all of these forms except Figs. 5 and 6* was withdrawn, so that the only forms at present charged to infringe are those of said Figs. 5 and 6.

It is not necessary for immediate purposes to consider details of differences of construction between the four forms finally admitted not to be infringements and the two remaining. It may be noted, however, in passing that there is a great similarity in what will later more clearly be shown to be the pertinent features of construction between the two forms charged to infringe and the four withdrawn from the charge.

The very fact of the withdrawal of 4/6 of the charge of infringement—the admission that four out of the six forms originally complained of do not infringe—shows the hair-splitting and uncertain theory of plaintiffs' case, and justifies without mere affirmance of a wide latitude to the trial court's discretion. Incidentally, in finally relying upon only two out of the six forms, appellants' counsel discredits 2/3 of the testimony of their own expert, John D. Hackstaff, who apparently was just as sure that the four now admittedly non-infringing traps trespassed on the Trumble patent in suit as he was of the two finally settled upon.

However, the point we are now endeavoring to present and emphasize is that *only two traps are charged to infringe*—a trifling basis for a cry of irreparable injury.

It is obvious that the charge of infringement must stand or fall upon the exceedingly slight differences between the four forms withdrawn from the charge and the two remaining. The slightness of the differences between those alleged to infringe and those admitted not to infringe, and the insignificant volume of alleged infringement, we urge precludes any inference of irreparable injury sufficient to sustain the grant of a preliminary injunction. Such is not "a tremendous exigency" or "an extraordinary event" or an "obvious injustice" within the meaning of Judge Bledsoe's decision in the case of *Martin Iron Works v. Waterman*, quoted *supra*. This court cannot in the case at bar be "persuaded from a very obvious inspection of the devices in controversy" (to use more of the language of Judge Bledsoe in the decision last referred to) that there is infringement which must immediately be stopped by the injunctional arm of the court or else irreparable injury will result,—particularly in view of the positiveness of the trial court's opinion on the order appealed from that there was no infringement.

The fact that there were only two of the forms finally relied upon as alleged infringements appears from the affidavit of William McGraw on behalf of plaintiffs (see beginning middle of R. 20 as to the circumstances surrounding said Figs. 5 and 6).

Now, in the affidavit of Mr. Lorraine, particularly at R. 79, it appears that gas traps sell for prices ranging from $450.00 to $2350.00, and that defendant corpora-

tion sells on an average $67,000.00 worth of traps per month. Recurring again to the affidavit of William McGraw on behalf of plaintiffs, it appears (beginning R. 18) that the six traps forming the basis for the order to show cause were constructed and seen by plaintiffs at intervals beginning August 20, 1928, to about the same time in 1929, the two forms finally settled upon as alleged infringements having been observed by the plaintiffs the latter part of the year. Thus it appears that after observation of defendant's operations for a year, and the tentative selection of six traps originally complained of, plaintiffs finally admitted that only two traps made during a year could, under any theory, sustain the charge, and during this time defendant was putting out $67,000.00 worth of traps per month—large contrivances easily followed and kept track of, all presumably stamped the Lorraine Company's name plate (as were all the traps referred to in the McGraw affidavit).

The decision of Your Honors in the case of *Lorraine v. Townsend* (290 Fed. 54) is dated June 4, 1923—nearly seven years ago. During these years, with defendant doing the largest business in the sale of gas traps in the world, plaintiffs found only two traps made less than a year ago to complain of. (*And the trial court is most positive in its opinion that these do not infringe.*) Near the bottom of R. 93 Mr. Lorraine testifies (and his statements are not controverted):

> "I have never been secretive about disclosing the construction of the models and design of my traps. They have been freely advertised and their interior construction shown to prospective purchasers and others, and I have always given full information to plaintiffs concerning their construction and design."

Two traps out of many thousands—the utmost frankness and good faith in fully disclosing features of construction to plaintiffs. Surely, even assuming possible infringement, this insignificant trespass is too trifling to form the basis of a preliminary injunction.

The following testimony of Mr. Lorraine (middle of R. 94) is also uncontroverted:

> "The defendant Lorraine Corporation is amply able financially to pay all possible damages which might finally be decreed against them in case infringement should be found. In case of a final decision in favor of plaintiffs in this case, plaintiff would be entitled to the recovery of a money judgment, but in the event a preliminary injunction should be granted on the present motion, possible recovery on plaintiffs' injunction bond could not repair the injury done to the goodwill of defendant company, * * *."

Why should plaintiffs so earnestly desire a preliminary injunction based upon only two traps out of thousands made and sold by defendant during the six years following the decision of this court construing the Trumble patent?

The answer is simple: any kind of an injunction, however limited, would assist defendant in purloining some of Lorraine's $67,000.00-per-month business. It would injure his good will. As a practical matter it is difficult—often impossible—to explain to a prospective purchaser that the injunction covers only a rivet in the top of the trap and that defendant has omitted the rivet, and therefore does not come within the scope of the injunction. The prospective purchaser only knows that there has been found by the court something in a defendant's de-

vice to criticize, and this greatly hinders sales and frequently throws business into the hands of the suit-maintaining competitor. It is also impossible to control the subtle ways in which the scope of an injunction may be represented or misunderstood. Thus it is that the court's injunction is often used—not to prevent irreparable injury to plaintiff—but to injure the good will of a defendant—simply as a business-getter. In case of a large business like that of Lorraine, counsels' fees and court costs incurred by plaintiffs in such a gamble are often well spent,—if business results can be accepted as a criterion.

Plaintiffs do not deny the statements of Mr. Lorraine's affidavit (middle of R. 93) as follows:

> "I know from my past experience in litigation involving the Trumble patent in suit that any preliminary injunction which might be granted by this court will be advertised in every possible way in order to injure the good will of defendant as much as possible. To the confusion of the trade and public the real scope of the Trumble patent in suit will be subtly misrepresented in ways impossible of control by the court. Any bond which may be given by plaintiffs cannot possibly be adequate to cover the resulting irreparable injury which must inevitably follow the issuance of such an injunction, as sought by the present motion."

We urge again the extreme applicability of the law as stated by the Circuit Court of Appeals for the Seventh Circuit in *Standard Elevator Company v. Crane Elevator Company,* quoted *supra* as follows:

> "The object of the provisional remedy is preventative largely and it will not be granted if it is more likely to produce than to prevent irreparable mischief. If the controversy between the parties be

> substantial and not as to the alleged infringer colorable merely, courts of equity are not disposed to adjudicate upon the rights of parties otherwise than according to the approved usages of chancery when the defendant's rights might by the issuance of a writ of injunction be put in great jeopardy—and the complainant can be compensated in damages."

The court in the case just above referred to also said:

> "It would * * * be most unsafe to determine this controversy without full and orderly proof. It would be most unwise to imperil and presumably wholly ruin the large capital and interests involved in the business of the defendant by arresting the enterprise in advance of a final decree when the damages which the appellee may sustain can be compensated in money."

Referring briefly to the defense of laches: an examination of the affidavit of William McGraw, for plaintiff, shows that first of the six traps originally relied upon to secure the order to show cause (four of which were afterwards withdrawn) was seen by the defendant over a year before suit filed or application for injunction was made. Under the theory of the case as first presented to secure the order to show cause, plaintiffs stood by for a year before taking any action to prevent what they in their bill represent was "irreparable injury." True, the last two traps finally relied upon were made only shortly before the suit was filed, but they are too closely similar to the four withdrawn, the first of which was made a year before, to be not affected by the long delay. This laches is explained and referred to in the affidavit of Mr. Lorraine (near top of R. 94).

To conclude under this head: even without consideration of the merits, we urge that the foregoing circum-

stances support a wide discretion of the trial court in denying the injunction, and such circumstances are such as to make a finding of abuse of discretion untenable.

A MOST IMPORTANT PRELIMINARY LIGHT ON THE MERITS.

NARROWNESS TOO NEAR THE VANISHING POINT TO BE MEASURED IS THE SCOPE OF THE PATENT IN SUIT AS HERETOFORE ADJUDICATED—A SCOPE ONLY SUFFICIENT TO COVER OUT OF MANY THOUSANDS OF TRAPS MADE BY DEFENDANT A SINGLE, EXPERIMENTAL, ABANDONED FAILURE.

Nearly $1,000,000.00 a year represents the volume of defendant's business—a business which extends to every oil field in the world—in the manufacture and sale of devices of the same general character as that of the patent in suit.

Defendant has experimented with scores of different forms and modifications of gas traps, and has made and sold since the grant and issuance of the Trumble patent in suit thousands of such devices.

Out of this immense volume of business only A SINGLE TRAP in all prior litigation involving the patent in suit, has ever been found to be an infringement, and that trap (Towner No. 3) was only made experimentally, turned out to be a failure, and was abandoned.

As the court will see by reference to its opinion in *Lorraine v. Townsend,* Case No. 3945, reported 290 Fed.

54, this court (near the bottom of page 59) found the only infringement to consist of the making of a single trap described as Towner (Tonner) No. 3. That there was only one of such traps made and that it was purely experimental and after being tried out was abandoned as a failure is proven by the testimony of Mr. Lorraine given during the trial of the case in March, 1922. This testimony appears at page 253 *et seq.* of the record of Case No. 3945 (to which we are authorized by stipulation in the case at bar to refer). Mr. Lorraine's sworn statements to the same effect are repeated on cross-examination at R. 314. After the finding of infringement by this single Towner trap, the case was regularly referred to a master to take an accounting, and such proceedings languished many months without any action, and during such time and since there has been no attack upon the truthfulness of Mr. Lorraine's testimony as to the experimental, unprofitable, and isolated nature of this abandoned Towner No. 3 failure.

After the interlocutory decree of Judge Wolverton (reversed, as we have seen, as to all except Towner No. 3), contempt proceedings were instituted against David G. Lorraine, predecessor of this defendant, charging violation of Judge Wolverton's injunction by the manufacture and sale of what was known as Lorraine Model 16 Trap. The defendant, however, was purged of the alleged contempt—and said Model 16 was found not an infringement of Judge Wolverton's decision, *broad as it was, before reversal by this court.* The opinion of the court (Judge Bledsoe) finding Model 16 not an infringement is found R. 142 of the case at bar.

At R. 77 Mr. Lorraine's affidavit in opposition to the motion, the propriety of the denial of which constitutes the subject-matter of this appeal, is found. Other important facts of our black letter heading are in this affidavit established; and they have not, as we have stated, since been controverted; namely, the large number of different forms of traps made and experimented with by Mr. Lorraine (concededly not infringements), the constant change in details of design in an endeavor to meet all conditions as cheaply as possible; the great growth of an international business of defendant in the manufacture and sale of these devices until it now approximates $67,000.00 per month.

The foregoing has been intended to show in a most general way high lights of the status and scope of the patent in suit. With the net result of prior litigation being that the patent is only broad enough, of all the traps made by defendant, to cover an isolated experimental failure, we urge that this court should be careful now, sixteen years after the alleged invention of Trumble, not to construe it to cover the latest success—the outgrowth of sixteen years of development in this art.

IT IS NOT TRUE THAT THE VALIDITY OF THE PATENT IS RES ADJUDICATA.

The res adjudicata asserted, however, only goes to our attacks upon validity, not to our denial of infringement.

Defendant Lorraine Corporation was not a party to the prior suit adjudicating the Trumble patent, and did not in fact participate in the defense of said suit,

notwithstanding the somewhat misleading condition of the pleadings—which are corrected by other admitted facts or uncontroverted records.

Plaintiffs in this case filed an original bill. If this defendant had been bound by the former injunction and decree, a contempt proceeding would have been the proper procedure. By filing an original bill plaintiffs admit that defendant is entitled to avail itself of any new defense, and the sworn answer used on the present motion did set up new and additional defenses in response to issues presented by such bill.

Inasmuch as invalidity is very clear, we rely strongly upon this defense, although if the trial court's finding of non-infringement is sustained and this case ordered dismissed on the affirmance of the order appealed from, it may not be necessary for the court in its opinion to pass upon this important defense.

The quotation from the pleadings set forth in appellants' brief, page 4, does not sufficiently disclose the facts and is therefore misleading: the suit was pending for a long *long* time without any action whatever on an accounting, to prove and recover on behalf of plaintiffs' profits and damages resulting from the making of the single, experimental, abandoned, profitless Towner No. 3 failure, on which experiment defendant suffered only a loss—the only infringement found—obviously a foolish procedure.

The only "participation" of defendant corporation, if it can be possibly designated as such, consisted of assuming and paying, as consideration for the transfer of the business to it, certain of Lorraine's individual

expenses in connection with the suit, *long after the case had been tried, decided, appealed, briefed, argued, and submitted for the decision of this Court of Appeals.*

Although two supplemental bills charging continued or additional infringements were filed at intervals in and during the pendency of proceedings against Lorraine individually, the second three years after the trial, *the charges of infringement were always against David G. Lorraine individually and never against the Lorraine Corporation.*

The Lorraine Corporation at the time of its organization (May 1, 1923) took over what is conceded in this proceeding to have been the largest organization for the manufacture and sale of gas traps in the world, and continued to take business away from plaintiffs in the constant growth of that business, *concededly without infringing the Trumble patent in suit,* for the remaining three years that the suit languished on an outrageous accounting proceeding—not to recover gains and profits, but to recover what Lorraine *lost,* apparently, on the abandoned Towner No. 3 experiment. (Suit was dismissed per stipulation, April 30, 1926.) And during this competition which was daily demonstrating the utter uselessness of Trumble's alleged invention, *no attempt was made to join the Lorraine Corporation as a party to the suit,* and not even the remotest suggestion was made that any of the traps upon which this highly successful competing business was based, constituted an infringement of the patent in suit. There was clearly no reason why the Lorraine Corporation should have employed attorneys to defend itself in such suit, and it did not participate in any manner whatsoever in such defense.

The accuracy of the above statement can be readily checked by reference to the judgment roll of E-113 Equity, the record upon which this court's decision No. 3945, Lorraine v. Townsend, was based; the complaint was filed in January, 1921; trial commenced March 22, 1922, and was concluded March 28, 1922. The interlocutory decree of Judge Wolverton was entered September 29, 1922; appeal was thereafter perfected and transcript on appeal filed with the clerk of the United States Circuit Court of Appeals in November, 1922. *The Lorraine Corporation did not come into existence until May 1, 1923.* This last date appears in the record in the case of David G. Lorraine and Lorraine Corporation v. Townsend *et al.*, F-80 Equity, in the District Court, in Plaintiffs' Exhibit No. 2, Articles of Incorporation, which was called to the judicial notice of the trial court and we do not believe will be controverted.

But overlooking the facts that the Lorraine Corporation did not come into existence until eight months after entry of the decree by which it is now asserted to be bound and that not a single device found to be an infringement was taken over at the time of its organization or was thereafter ever made, used, or sold by the defendant corporation: and assuming that payment of a small amount of Lorraine's individual expenses on an accounting upon which there could have been no possible recovery and which, consequently, was so trifling that it was finally abandoned—Granting for the sake of argument that such facts make the corporate defendant in effect a party to the suit and bound by the adjudication, we assert that the essence of such adjudication was not that the

Trumble patent was valid as covering a steam boiler or a bicycle or ANY KIND of an oil and gas separator, but was only valid as covering a single abandoned experiment, namely, Towner No. 3 Trap.

The adjudication did not indicate that the Trumble patent could be stretched to cover forms of devices bearing no resemblance whatsoever to the Trumble Drawings or that during any such attempted stretching process prior art could be ignored.

The mere finding by a court that a patent is valid *is no indication whatsoever of its scope.* Frequently patents are held valid, but so extremely narrow that only a "Chinese copy" of the device shown in the specifications and drawings could be found an infringement.

When the defendant set up in prior litigation the defense of invalidity of the patent in suit, *it did so with particular reference to the devices charged to infringe;* if it had been asserted in such prior litigation that traps having a covered trough-like extension of the inlet pipe into the separator, that is to say, the inlet pipe of Cooper, for instance, made square and run circumferentially and spirally around the inside of the trap, were infringements, we certainly would have made other attacks in such litigation upon the validity of the Trumble patent as covering such constructions. *Such issues were not raised in prior litigation because not presented.* They were not passed upon, and consequently the decision is not *res adjudicata* as to any such subject-matter.

But certainly the Lorraine Corporation is not bound by such adjudication.

The filing of an original bill on behalf of plaintiffs against defendant Corporation presenting for joinder not only issues of infringement but those also of validity, instead of instituting contempt proceedings against said corporate defendant for alleged violation of the perpetual injunction granted in the decree against Lorraine, constitutes an admission on behalf of plaintiff that the decree against Lorraine individually is not res adjudicata as against the corporation.

Apparently not much reliance is placed in the soundness of the argument suggesting that the Lorraine Corporation is bound by a decree against Lorraine individually (which decree was entered eight months before the corporation came into existence); so plaintiffs file an *original bill* presenting the usual issues in patent causes for joinder, *i. e.*, those of *invention, novelty, utility, and scope.* The subpoena required defendant to *answer* said bill, which necessitated a joinder of issues thus presented; and defendant corporation *did* join such issues in a sworn answer, which is used as one of the affidavits in opposition to the present motion. Under the theory now first asserted in plaintiffs' reply brief, plaintiffs have a *perpetual* injunction against defendant corporation. Why, therefore, order defendant to join issue on validity, and why apply for a new and only *temporary* injunction?

If defendant Lorraine Corporation was in privity with Lorraine individually as regards the subject-matter of the prior suit, of course such corporate defendant would be bound by the perpetual injunction entered against Lorraine individually, and any further infringement would be ground for contempt proceedings. Surely, the corpo-

rate defendant cannot be ordered by the subpoena of this court to join issue on an original bill and then when it has done so in effect be treated on certain of the issues joined as though it had allowed the case to go by default for failure to answer.

We consider the argument on behalf of plaintiff attacking the right of the corporate defendant to offer evidence on the issues of validity (joined on plaintiffs' invitation) to be preposterous. A is sued for trespass and after final decision and while the case is hanging on for three years to determine whether 6¢ should be the amount of the nominal damages or whether 3¢ is sufficient, B agrees to pay A's costs and fees incident to such trifling accounting. Five years later the same plaintiff sues B for an entirely different alleged trespass. Is there any such privity as should preclude B from presenting every defense he may have to the charge? Before one can be bound by a decree, he must be either a party to the suit in which the decree was entered or in privity with a party. This, in brief, is the substance of the decisions mentioned on page 5 of appellants' brief. There is nothing remotely resembling privity between Lorraine and the Lorraine Corporation relating to the subject-matter of the adjudication in the suit against Lorraine individually, as there was no transfer by Lorraine individually to the corporate defendant *of even a single trap* which had been held to constitute an infringement upon the Trumble patent in suit. The very first suggestion that the Lorraine Corporation, as the successor of Lorraine interests or otherwise, infringed the Trumble patent in suit is presented in the original bill filed in this case, and there

is no allegation in either complaint or affidavits on behalf of plaintiff in support of the present motion or otherwise which could possibly authorize any inference of privity of the Lorraine Corporation with Lorraine in the subject-matter of such prior adjudication.

ASSUMING, FOR THE SAKE OF ARGUMENT, VALIDITY, WHAT IS THE SCOPE OF THE TRUMBLE PATENT IN SUIT?

We cannot pas upon the issue of infringement until we have answered this question. The decision of this court in Lorraine v. Townsend, No. 3945, reported 290 Fed. 54, takes us far toward a clear and conclusive answer, and moreover, that decision without further evidence is all that is required to most clearly exclude as infringements the devices now complained of.

But while such decision contains a most thorough consideration of much of the pertinent prior art, there are several other references, now made part of the record, in the light of which we are confident that the microscopic narrowness of the Trumble patent, as heretofore construed (limited as it is to a single failure), will merge into nothingness.

The trial court considered this prior decision carefully and most conservatively based its decision upon the scope there defined, apparently without reference to other conclusive evidence and other angles of the evidence heretofor considered which still further narrows the alleged invention to the vanishing point.

The conclusion of the trial court after such consideration [Opinion, R. 143-145] was that the only infringe-

ment found by this court (the abandoned failure of Towner No. 3) is a "border line device as measured by the Trumble invention" and that "it comes within the field with little to spare" and that "it should be affirmed we think that the extreme range of equivalents possible to be allowed to the Trumble patent was reached in holding that Towner No. 3 infringed."

In passing, we call attention of this tribunal to the positiveness of the opinion of the trial court as expressed in the foregoing quotations, urging that even if Your Honors should be in doubt as to the merits of our defense of non-infringement, the wide discretion of the trial court based upon such a clear and positive view in refusing to apply a most harsh and dangerous remedy should not be disturbed.

Note particularly the last paragraph of Judge James' opinion, reading:

> "In my opinion the apparatus (alleged infringements in the case at bar) is not reasonably an equivalent of Trumble's use of the oil-spreading baffle plates. I think to hold differently would be to allow a claim for the broadest kind of equivalents, far beyond that permitted by a fair interpretation of the decision of the Circuit Court of Appeals."

Walker on Patents (6th Ed.), Vol. 1, Sec. 704, p. 786, says:

> "A preliminary injunction will not be granted when defendant is responsible and a substantial doubt of infringement exists, or where the complainant's right is doubtful."

In *Standard Elevator Company v. Crane Elevator Company,* quoted *supra,* the court near the bottom of page 19 (56 Fed.) has said that *infringement must be beyond*

a reasonable doubt, and on page 720 the court comments upon the *ex parte* nature of the application and the consequent lack of opportunity for cross-examination, saying, "scientific expert evidence is not wholly reliable when not subjected to the searchlight of intelligent cross-examination."

Surely the positive opinion of Judge James, without any examination whatsoever by Your Honors of the merits, is sufficient to show the existence of *at least* a reasonable doubt. Again, if the grant or withholding of the writ is *discretionary,* who should have the doubt, the trial court or this tribunal? If an examination of the opinion of the court below shows a good faith doubt, that state of mind of the trial court should govern, otherwise discretion is taken away. Here we have the strongest conviction expressed by the trial court as a ground for a safe and careful exercise of discretion. We submit that on these considerations alone the order appealed from should be affirmed.

It Is Our Purpose Under This Head to Endeavor to Aid the Court in a Study of Prior Decisions Interpreting the Trumble Patent in Order That the Soundness of Judge James' Opinion May Be Clear Beyond a Reasonable Doubt, and That Your Honors May, on Affirmance of the Order Appealed From, Direct a Dismissal of This Suit.

In the first place, while there are four claims of the Trumble patent in suit, it should be noted that their real essence is quite simple: a flowing film of oil on backing surfaces and pressure. Such is quickly seen to be the substance of the claims, for elements such as an expansion chamber, gas and oil inlets and outlets, manifestly,

must be part of any oil and gas separator; and obviously, no novelty or invention could be predicated on their presence separately or in combination: the features or elements which constitute the real essence of alleged invention, as a reading of the prior decision together with the patent will show, is simply a flowing film on a backing of some kind and pressure.

Now it is also to be noted that pressure in said decision interpreting the Trumble patent, is found to be *a natural incident* of all gas traps. What is left, then, upon which to predicate patentable novelty and invention? *Nothing but a flowing film of oil on backing surfaces.*

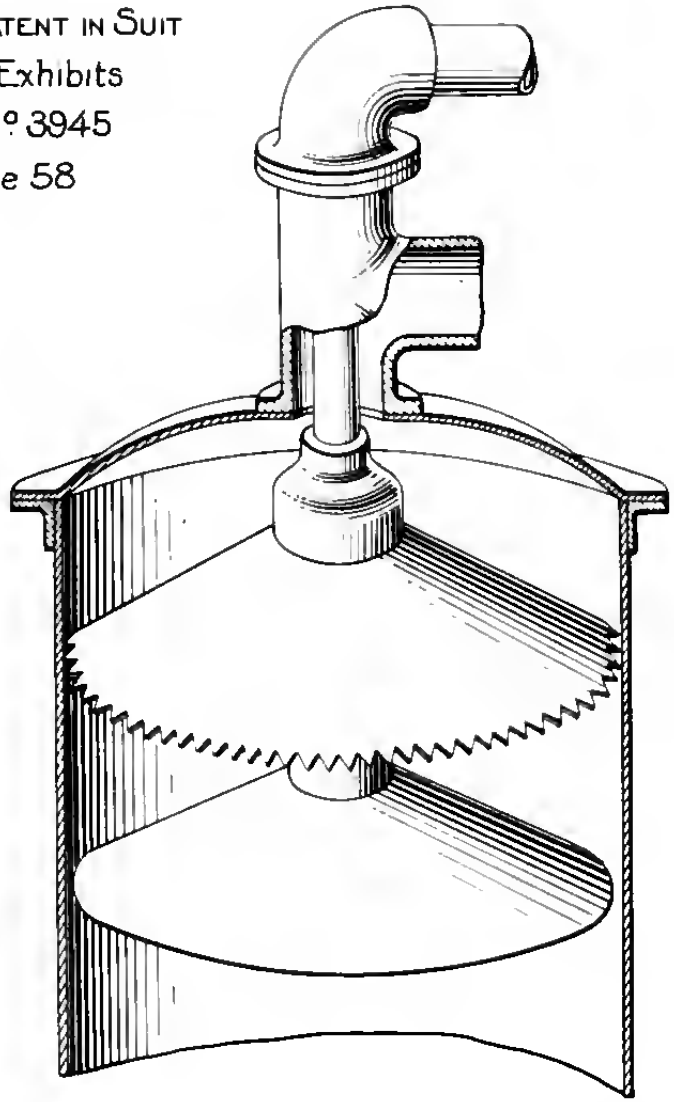
It takes only a glance at but a few of the prior art devices to be convinced that the flowing of a film of oil over a surface in a gas-trap was very old long prior to Trumble. Notice particularly the remarks of this court middle of page 57 of 290 Fed., where, considering the Cooper patent, this court said:

> "That the Cooper process was under pressure there can be no doubt. The patentee expressly points out that a high degrees of pressure is maintained in his device, by reason of its organic connection with the pressure system, and surely the filming is much more complete than in appellant's apparatus."

It is immediately quite obvious from a consideration of Cooper alone that the essence of supposed invention of Trumble cannot be defined as residing broadly in the film of oil, on *any kind* of a backing wall or plate, but if it can be discovered or defined—if it exists at all—it must be limited closely to the structure illustrated in the drawings of Trumble, that is to say, one in which the oil is received on the apex of a conical spreader, evenly

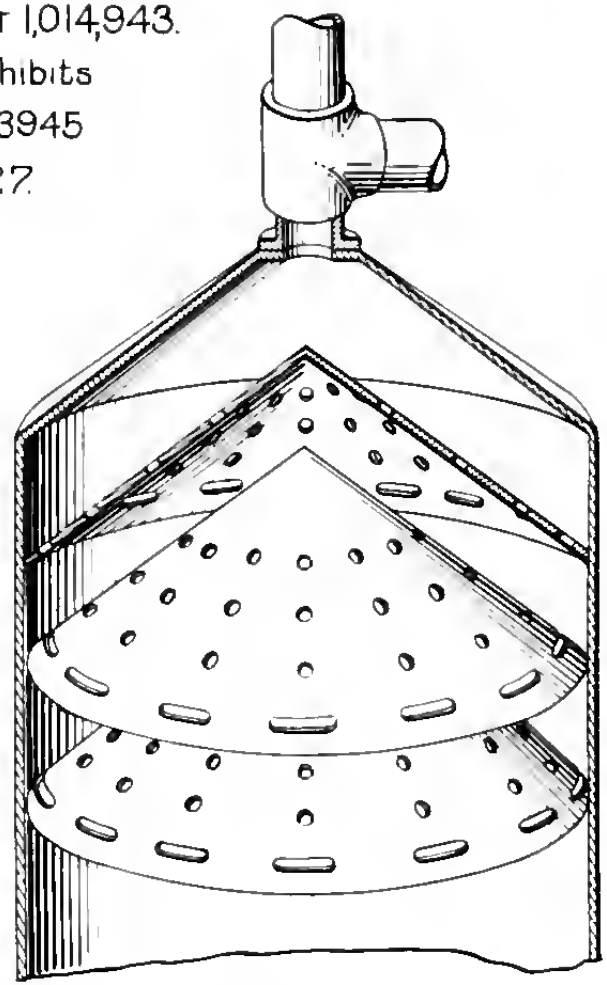
distributed over that spreader, and by it caused to flow to the side walls over which it descends, still in a film, to the oil pool below, theoretically at least, from the time of its entrance into the trap to the time it reaches the oil pool in a thin, unbroken film spread over the entire surface of cone and wall. We must further limit this definition by the requirement that the spreader plate must be imperforate, so that no oil drops down through any holes, otherwise ke cannot possibly escape the Bray patent No. 1,014,943, Book of Exhibits in case No. 3945, page 127.

TRUMBLE PATENT IN SUIT
Book of Exhibits
Case Nº 3945
Page 58



Differs from Bray only in having its conical spreader imperforate. Granted over Bray on an easily proven misrepresentation that the covering of the holes in Bray cone was an advantage.

BRAY PATENT 1,014,943.
Book of Exhibits
Case Nº 3945
Pg. 127

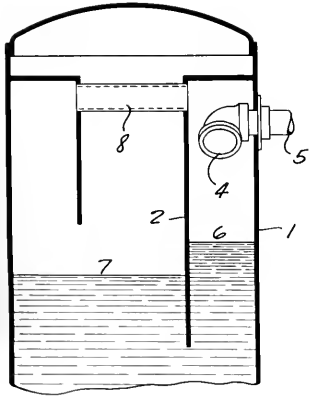


A complete anticipation of Trumble except for holes in the cone.
See discussion of this Court begining on pg. 58, first paragraph, 290 Federal reporter

At page 58, 290 Fed., this court considered fully the pertinence of the Bray reference with the result of limiting Trumble to an imperforate conical spreader plate. Near the bottom of the page last referred to this court implies as a ground for the finding of non-infringement by three of defendant's devices in controversy in that suit that the oil, while being spread under pressure, was spread "in a very different manner" from the Trumble patent.

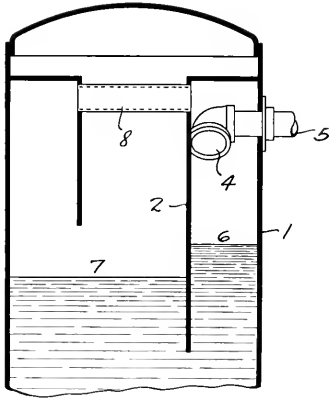
To summarize necessary conclusions from our foregoing partial consideration as to the scope of the Trumble patent: The Trumble patent does not cover any kind of spreading—*even a complete spreading of the oil on the walls of the separator*—but must be limited, if it can be sustained at all, to the spreading by the apparatus like that disclosed in the Trumble drawings, namely, a conical baffle plate, and this plate must be imperforate.

Now as a further checking of this scope let the court consider the forms of trap in said decision found by this court not to infringe. There were three of them, and they are correctly illustrated, even to scole, as will appear from the briefs in case No. 3945, by the following illustrations copied from said briefs:



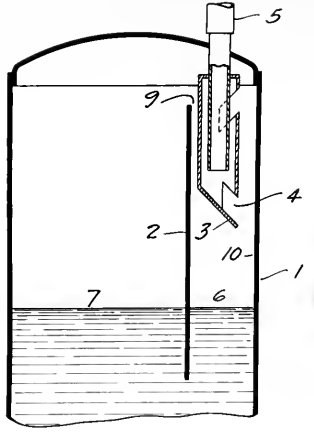
MODEL No. 2

DECISION OF JUDGE WOLVERTON AND C.C.A. FOUND NOT AN INFRINGEMENT



MODEL Nº 2 WITH THE SO-CALLED NIPPLE MACHINED OFF, SO AS TO "SIT CLOSELY AGAINST THE PARTITION WALL."

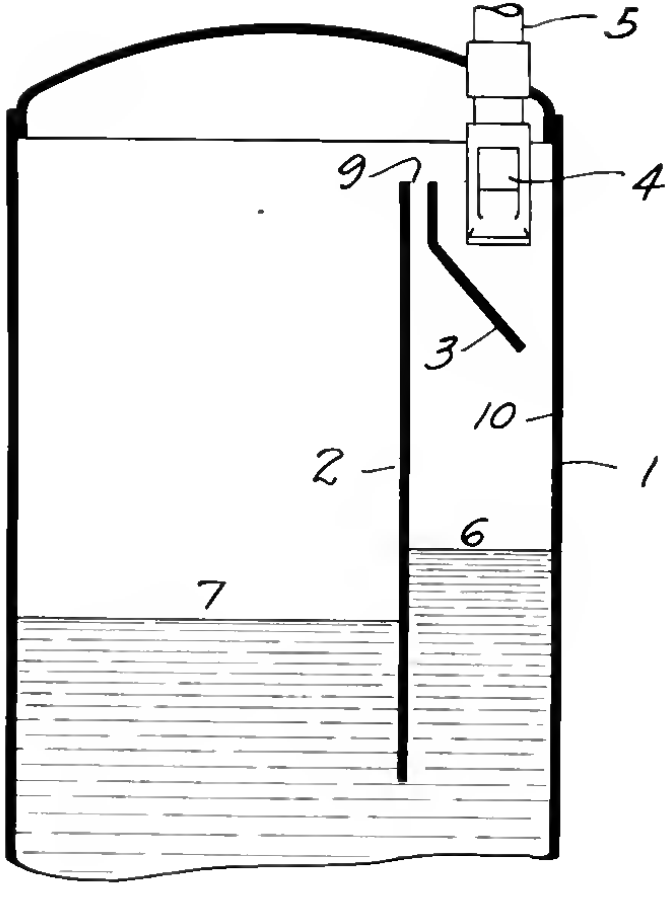
DECISION OF JUDGE WOLVERTON AND C.C.A. FOUND NOT AN INFRINGEMENT.



MODEL Nº 1

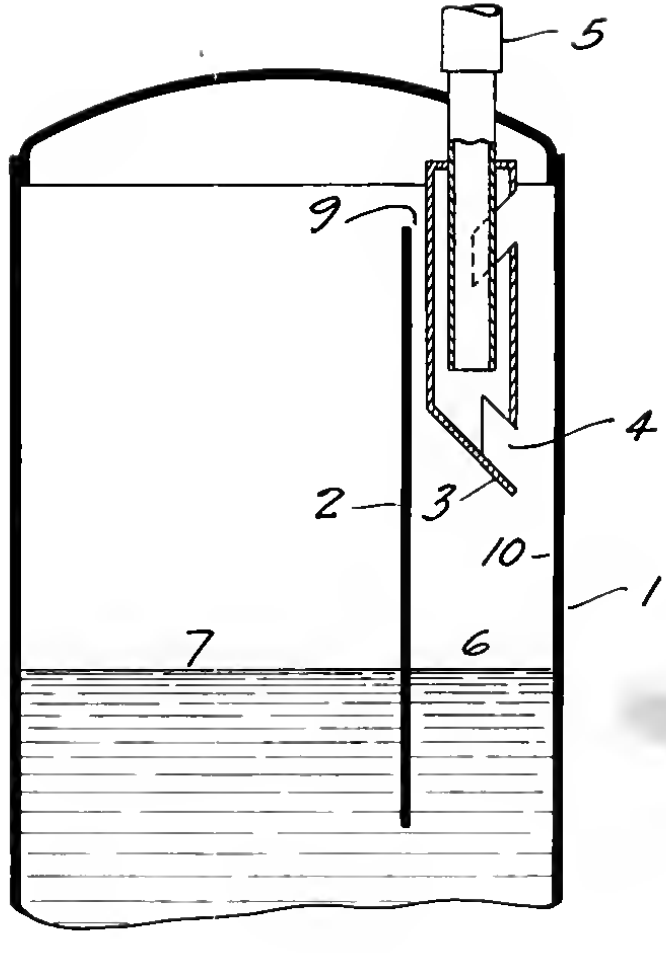
DECISION OF JUDGE WOLVERTON AND C.C.A. FOUND NOT AN INFRINGEMENT

Now let the court compare Towner No. 3 found to infringe with the nearest approach to it found not to infringe:



TONNER Nº 3

DECISION OF JUDGE WOLVERTON AND C.C.A.
THE ONLY TRAP FOUND TO BE AN INFRINGEMENT



MODEL Nº 1

DECISION OF JUDGE WOLVERTON AND C.C.A.
FOUND NOT AN INFRINGEMENT

The only logical reason for finding infringement by Towner No. 3 was that the court was persuaded that the inclined plate of the first device found not to infringe was smaller than the corresponding plate at Towner No. 3, and that more of the oil flowed to the oil pool without being spread on the walls, and this clearly implies a finding that in order to infringe all the oil must be uniformly spread over the conical or inclined baffle plate and must by that plate or spreader be directed to the side walls, without falling or splashing to the bottom of the trap.

The foregoing would be consistent wtih the finding that MacIntosh patent No. 1,055,499, found in Book of Exhibits in Case No. 3945 at page 110, and considered middle of page 52, 290 Fed., in that :while the oil is thoroughly spread out in a thin film over a series of conical spreaders quite similar to Trumble, it is not by such spreaders directed to the side walls.

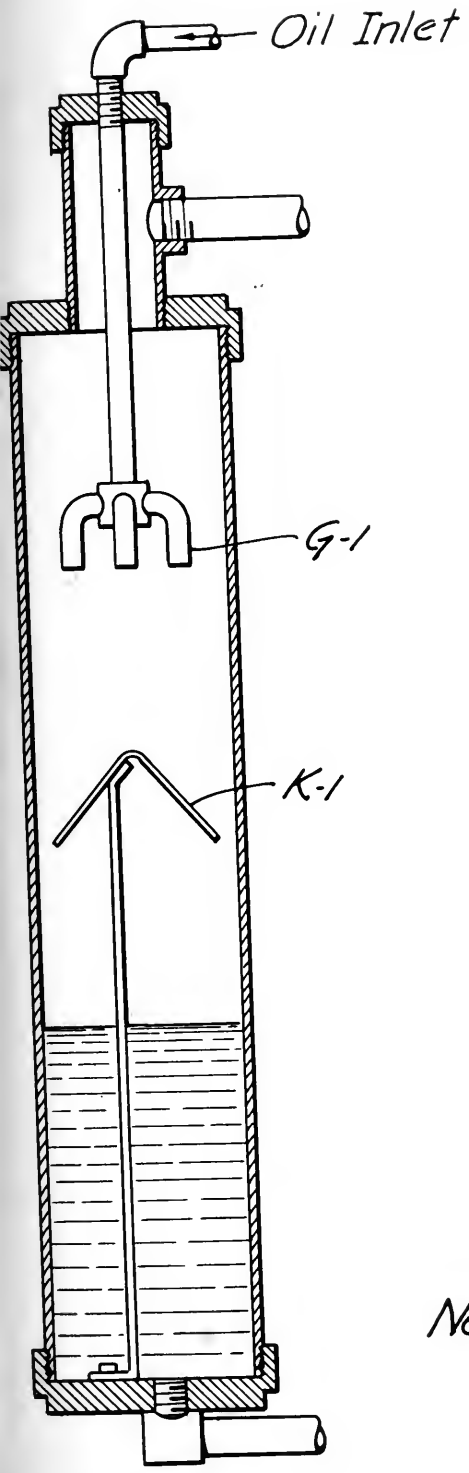
Now note that we have the narrowest possible theoretical invention as a result of the immediately preceding analysis: it only cnosists of plugging the holes in Bray's cones. It takes a lot of assumption to avoid seeing that there is no possible utility over the prior art in such a device—especially in view of the fact that all of the traps upon which Lorraine built his $1,000,000.00 a year business have been excluded as infringements and have not even been contended to be such.

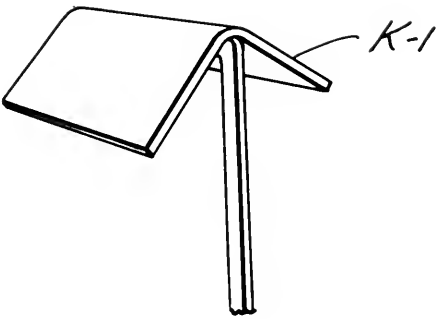
All the oil can be spread in a very complete film as in Cooper, and this is not the Trumble invention. All the oil is also spread in Model No. 2 with the nipple machined off, one of the devices found not to infringe by this court.

The complete spreading of the oil on the wall of the separator is not the criterion of infringement.

But let us now consider briefly one of the patents in the record of the prior case No. 3945, which, not being particularly emphasized by counsel, was apparently overlooked by this court in rendering its decision construing the Trumble patent, namely, Newman patent No. 856,088, found in the Book of Exhibits of case No. 3945 at page 140.

Referring to the illustrations on the following page: the oil entering through a single pipe at the top of the Newman separator, has its velocity reduced by being divided by four pipes G1 into four streams. It then falls in such four streams upon the wedged shaped spreader K1, is deflected to the side walls of the separator down which it flows to the oil pool below. (Remember that Your Honors have found that pressure is implied in all these separators—being a natural incident to the process.)





Newman #856,088

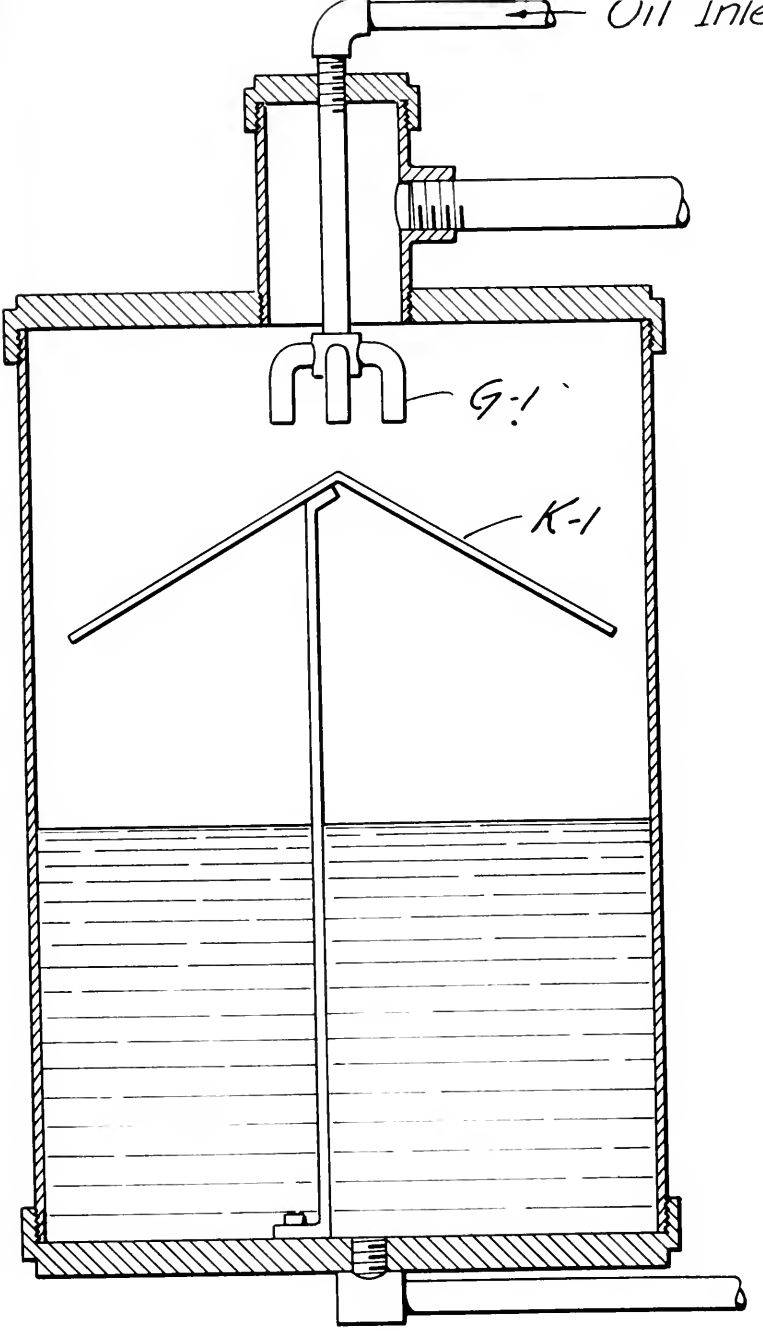
Drawings in patents are merely used to illustrate inventive ideas. See *Western Telephone Company v. American Telephone Company,* 131 Fed. 75, in the middle of page 77, where the court said:

> "Patent drawings are not required to be working plans."

In *Gold v. Gold,* 152 O. G. 731, 34 App. D. C. 152, the Court of Appeals for the District of Columbia said:

> "Manifestly, Patent Office drawings are not working drawings. Their object is to aid in conveying to one skilled in the art the idea of an inventor . . . the angle of inclination could be varied to meet the requirement of service."

With the idea in mind that patent drawings are not made to scale, but are merely used to illustrate an idea which one may use common sense in adapting to actual practice, suppose that Newman in the commercial form of his device had made it according to the proportions shown on the following page, *would it not still be the Newman invention?*

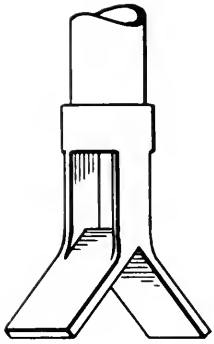


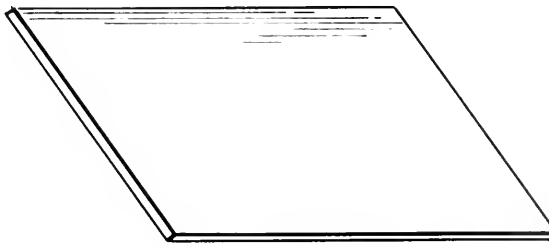
Newman #856,088
(Dimensions modified)

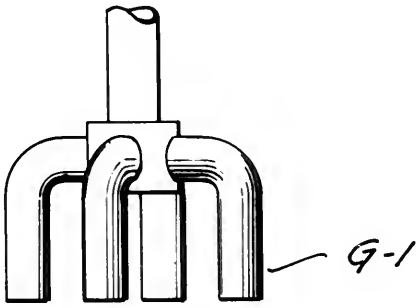
We earnestly insist that no sane or reasonable differentiation pertinent to the present charge of infringement can be drawn between Trumble and Newman, particularly in view of the decision of Your Honors finding Towner No. 3 an infringement.

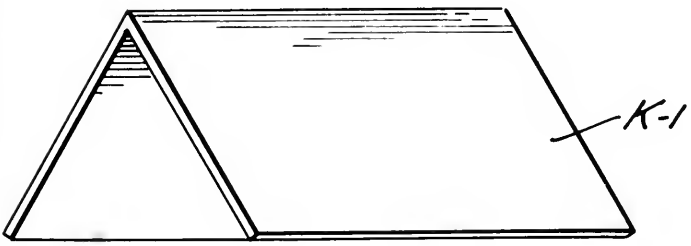
As showing the strength of the argument last suggested, let the court compare the following prospective views Towner (or Tonner) No. 3 and Newman. We urge that it is most clear that if Towner (Tonner) No. 3 is an infringement, Newman must be an anticipation. If Towner No. 3 is the same as Trumble, what did Trumble "invent" over Newman?

Newman #856,088
and Tonner #3
compared.



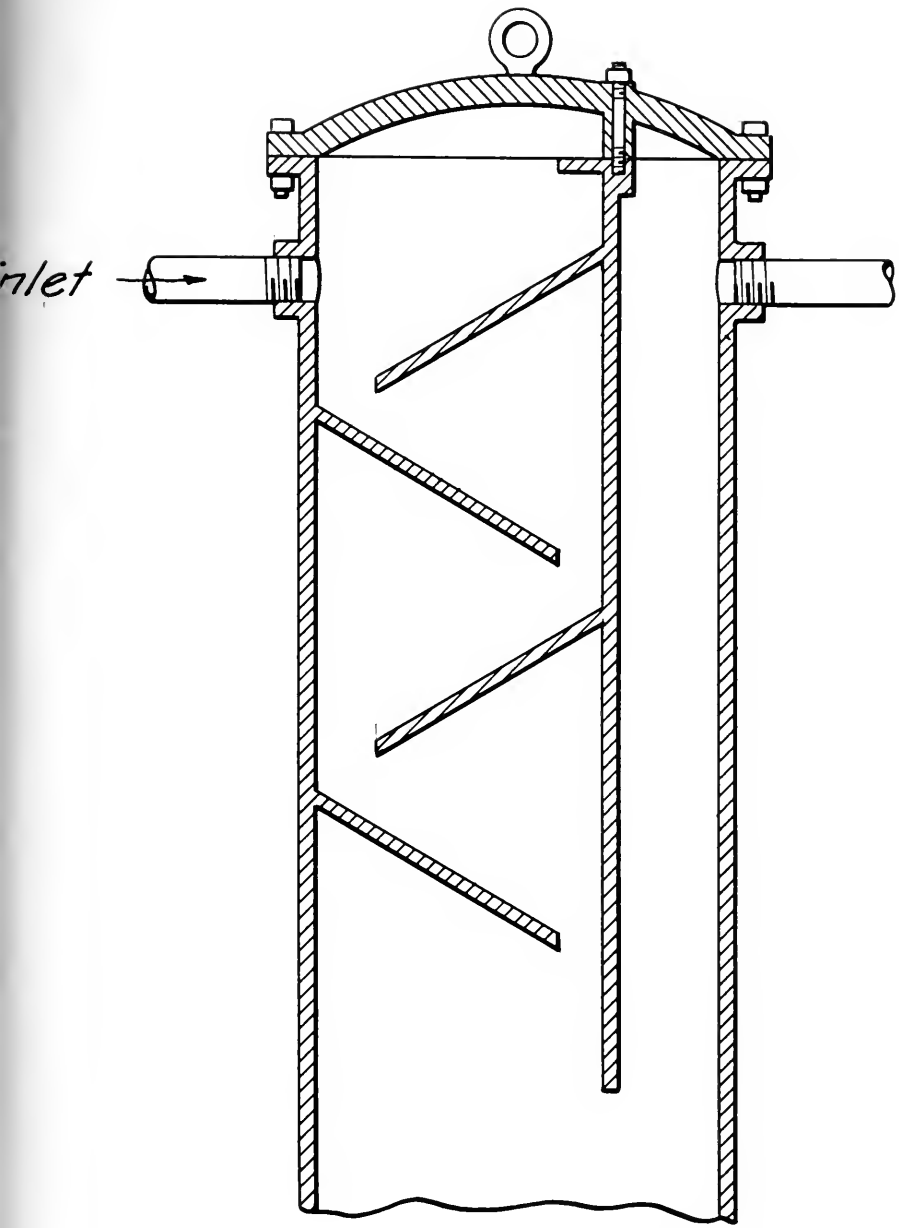






This is some of the evidence heretofore referred to not discussed in Your Honors' opinion which we urge erases the Trumble "invention" from the realm of realities. The slight differences in proportion, we urge, is not sufficient upon which to base a finding of invention.

The following illustration from the Taylor Patent No. 426,880 (Book of Exhibits in Case No. 3945), granted April 29, 1890, being a copy of Fig. 4 thereof, omitting immaterial details such as float, gauge glass, etc., shows the liquid coming into a separator and being immediately spread upon a series of inclined baffle plates in thin film. We earnestly urge that there is no invention in Trumble over Taylor. Any difference that might be suggested will be found a difference in words and not in substance.



Taylor #426,880

If Trumble Can Now Insist That His Patent Covers Widely Different Forms Bearing No Similarity in Appearance Whatsoever to the Drawing of the Trumble Patent in Suit, Why Is Not Cooper, or the Public, Including Defendant, as Much Entitled to a Diversity of Form, Dimensions, etc., of Such Prior Devices.

If Trumble can now, departing from his cones, insist that his patent covers anything by which velocity is reduced and the oil spread on the wall of the separator in a thin film, *why should not Cooper, Newman, Bray and others have an equal latitude?* What has Trumble done which should permit him to disregard entirely the form of the device shown and described in his drawing and specifications and endeavor to embrace within the scope of his alleged invention forms and relative dimensions which bear no resemblance whatsoever to the Trumble drawing?

Remembering again that the essence of the argument on this charge of infringement is that in the two traps of defendant finally selected, the oil is spread on the walls of the separator, its velocity being first reduced, let the court examine the following drawings of Fisher Patent No. 1,182,873, granted May 9, 1916, on an application filed November 20, 1913 (about a year before the filing of the Trumble application in suit). (Found in five copies of certain exhibits filed in lieu of printing under stipulation.)

The velocity of the incoming mixture in this Fisher patent is reduced by dividing it into four streams. These

four streams are then spread in films equa-distant over the walls of the separator down which it flows. *All the oil is so spread, and is so equally distributed.* There is no doubt as to the completeness of the spreading of this film. It is much more complete, thin, and uniform than in Towner No. 3 (the abandoned experiment found by this court to be the only infringement).

C. E. FISHER.

FLOAT OPERATED DRAIN VALVE.

APPLICATION FILED NOV. 20, 1912.

1,182,873.

Patented May 9, 1916

Fig. 1.

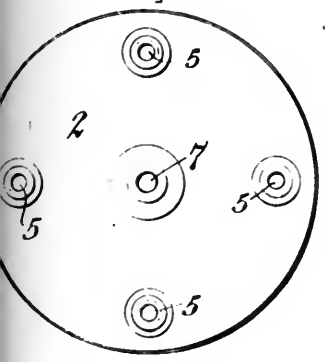


Fig. 3.

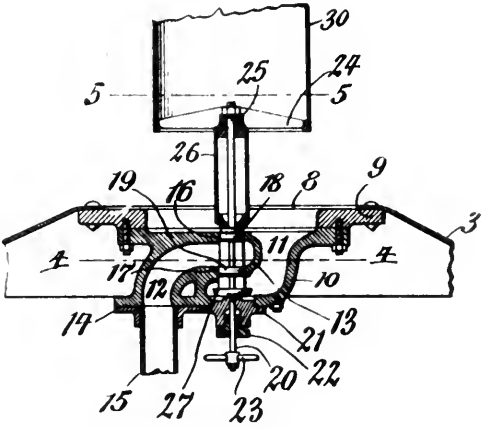


Fig. 2.

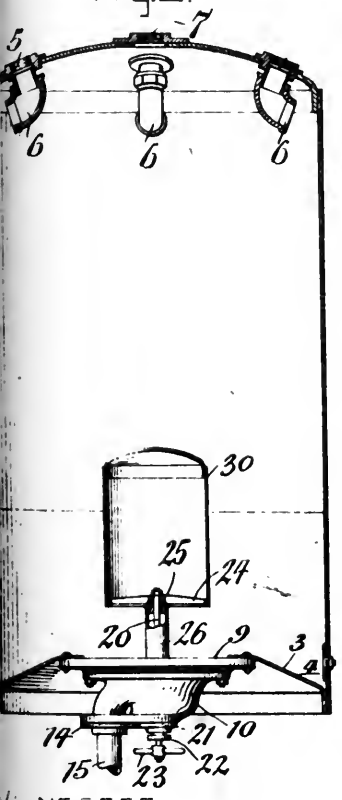


Fig. 4.

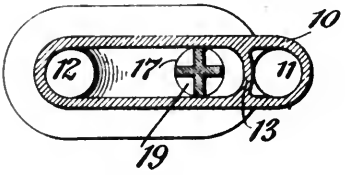
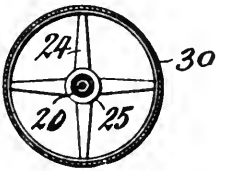


Fig. 5.



WITNESSES

Charles J. Butler

Mary Taylor

INVENTOR

Charles E. Fisher

BY Geyer & Popp

ATTORNEYS

How can plaintiffs consistently contend that defendant infringes because it spreads all the oil on the wall of the separator, velocity being first reduced, without admitting that Fisher anticipates? This is new evidence, and, like the Newman patent, not considered by this court in its opinion in case No. 3495.

There Is No Utility in the Disclosure of the Trumble Patent Over the Prior Art. The Trumble Patent Was Procured by Deceiving the Patent Office Examiner.

The court will remember that in discussing the Bray patent Your Honors (290 Fed., beginning first paragraph page 58) pointed out that Trumble experienced "great difficulty in meeting the Bray disclosure, and the essence of the Trumble attempted differentiation was that Bray *had holes in the cones of the separator while the Trumble cones were imperforate.*"

Overlooking that Newman showed the equivalent of an imperforated cone, the Patent Office granted the patent to Trumble solely *for plugging the holes in Bray's cones.* Why did the Patent Office do this? Only because of the following argument on the Trumble appiclation (these application proceedings are to be found page 36, Book of Exhibits, Case No. 3945):

> "All of the references cited would cause a breaking up of the flowing body of oil, or agitation thereof, and result in the carrying away of the light volatile oils with the gas.
>
> "In actual practice applicant has demonstrated that by the use of his separators the oil delivered therefrom has all of the light gasolines in permanent combination with the crude oil, such crude oil being from two

to three degrees lighter, according to the Baume scale, than oil which had been passed through other forms of separators. Affidavits to this effect will be furnished if the Examiner would care to have the same on file in this case."

This representation is untrue and can easily be shown to be such. There is actually no advantage in the Trumble unperforated cones over those of Bray, not to speak of Fisher, Newman, Cooper, and others.

If such representation to the Patent Office was false and the patent was secured by such fraudulent misrepresentation and a simple, easily conducted test will so show, we urge Your Honors that before reversing the refusal of the trial court to apply the drastic remedy of injunction prior to a hearing on the merits, that we may have an opportunity which would be permitted if the case were regularly set for trial to demonstrate a want of utility in Trumble. We made the following offer to the court below:

"We have now in the yards of defendant corporation some of the numerous junked Trumble traps embodying this alleged marvelous invention of Trumble that the world had long looked for, which users were so anxious and willing to exchange for the extremely more efficeint non-infringing traps of defendants' manufacture, that they traded them in and paid an additional price to get away from this alleged Trumble invention and to get the advantage of the Lorraine inventions. We propose to set up one of these abandoned Trumble traps, plaintiffs to assure themselves that it is in proper working order. We shall then take another one of these abandoned Trumble traps and put holes through the cones as illustrated in the Bray patent. Then let a test be made by running each of the traps under identical conditions. We maintain that the trap with the holes through the cones will produce the same quality of oil as the trap without the holes, and that there will be

no difference in the quality of the oil separated. If we are correct, *this is a clear demonstration that the Trumble patent was only granted by a misrepresentation as to utility over Bray.*"

DEFENDANT HAS NOT INFRINGED.

That the Two Devices Complained of Do Not Infringe Is so Clear That We Urge This Court on Affirmance of the Order Appealed From to Direct a Dismissal of This Suit.

There is nothing in defendant's devices at all analogous to the conical spreader of the Trumble patent. The Trumble cone performs three functions: (1) It checks the velocity of the incoming oil; (2) it spreads the oil thinly over its own extended surfaces; and (3) it conveys the oil to the wall of the separator, theoretically, at least, equally at all points, thus continuing the film from the apex of the cone to the oil pool.

Out of the six devices, all of quite similar construction, defendant has selected only two upon which to base the present charge, the remaining four being thus admitted not to be infringements. There is no element in these two devices completely performing the functions of the conical spreader of Trumble] neither is there anything in Trumble at all analogous to the spirally arranged extension of the inlet pipe of defendant's two devices in question. The spiral extension performs the function of reducing the velocity of the incoming oil before it enters the expansion chamber instead of after it enters as in the case of Trumble, and it performs this function in quite a different manner from the Trumble conical spreader.

No comparison between the Trumble device and those of defendant's charged to infringe is pertinent until the oil has passed the inlet orifice into the expansion chamber of

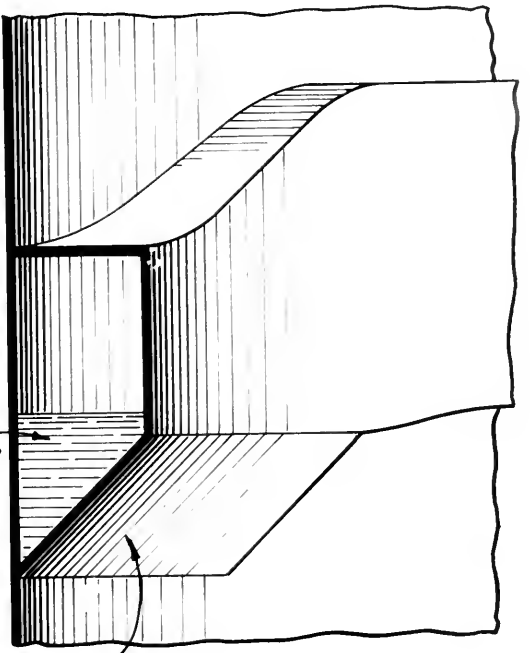
the separator. In Trumble immediately upon entry into the expansion chamber its velocity is reduced by being spread upon the apex of a cone; in defendant's devices it enters the expansion chamber in a solid wedge-like stream partly striking only one of the walls and partly falling to the bottom without being spread. Such mode of operation was in this court's opinion (290 Fed., about two-thirds down page 59) expressly excluded as an infringement of the Trumble patent in the following words:

> "The claims are to be read only upon an apparatus by which substantially the whole body of the oil is spread as a film or thin sheet on a backing wall and is not in the course of the process of separation broken up by any means into drops or streamlets."

From our consideration of the prior art, particularly Cooper and Fisher, where the oil is admittedly or clearly all directed in a thin film to the side wall down which it flows, it is quite apparent that the foregoing language of this court cannot be wrenched from its setting and used literally as a measure by which to determine the question of infringement; for it *literally reads upon both Fisher and Cooper;* and anticipation must be found unless we have the further limitation which we believe is clearly implied in this court's opinion, particularly in finding Towner No. 3 infringement, that the oil must be spread first on an inclined or conical surface and then upon the side wall—that there must be this double spreading.

What happens while the oil is still in the spiral inlet extension of defendant's devices is not material for it has then not reached the expansion chamber; nor is it sperad in any film while in such passage. The following illustration will clearly illustrate the lack of filming while in the inlet passage or just before it is discharged into the expansion chamber.

Defendant's Construction Charged to Infringe.
Models A-5 and A-6 — Affidavit of William McGraw

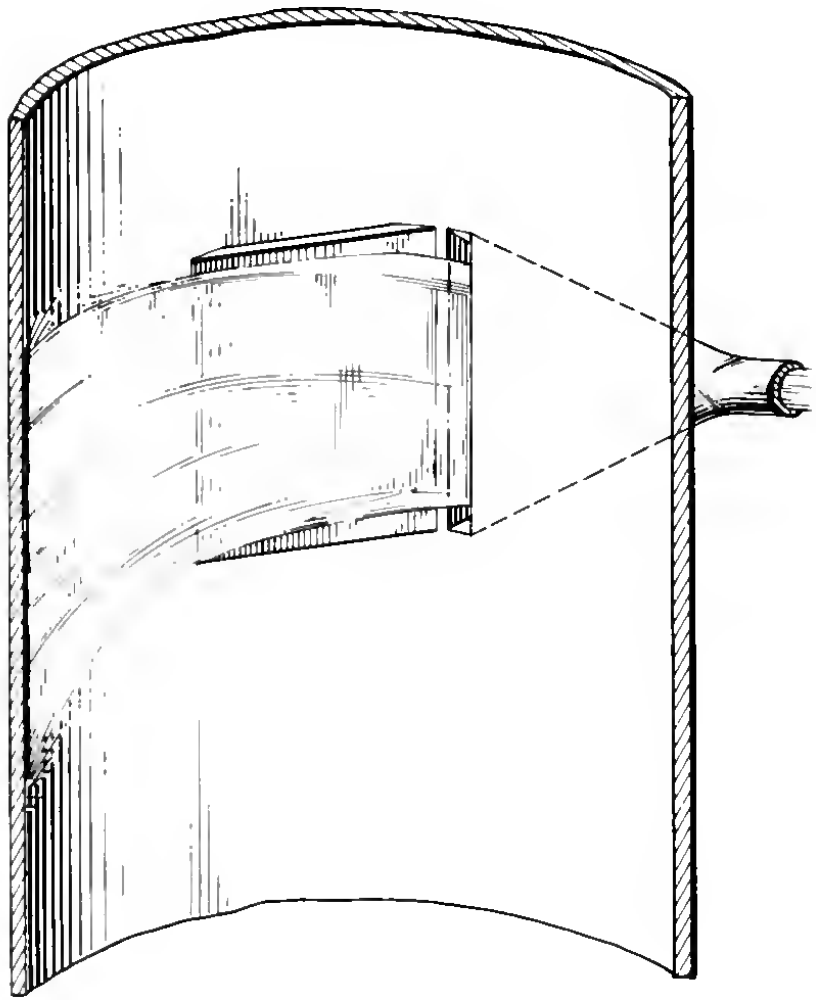


il not in a film but in a
olid wedge shaped stream

This inclined bottom of the oil inlet trough is not a spreader plate but simply forms a pocket into which the oil collects before being allowed to flow out over the wall of the separator.

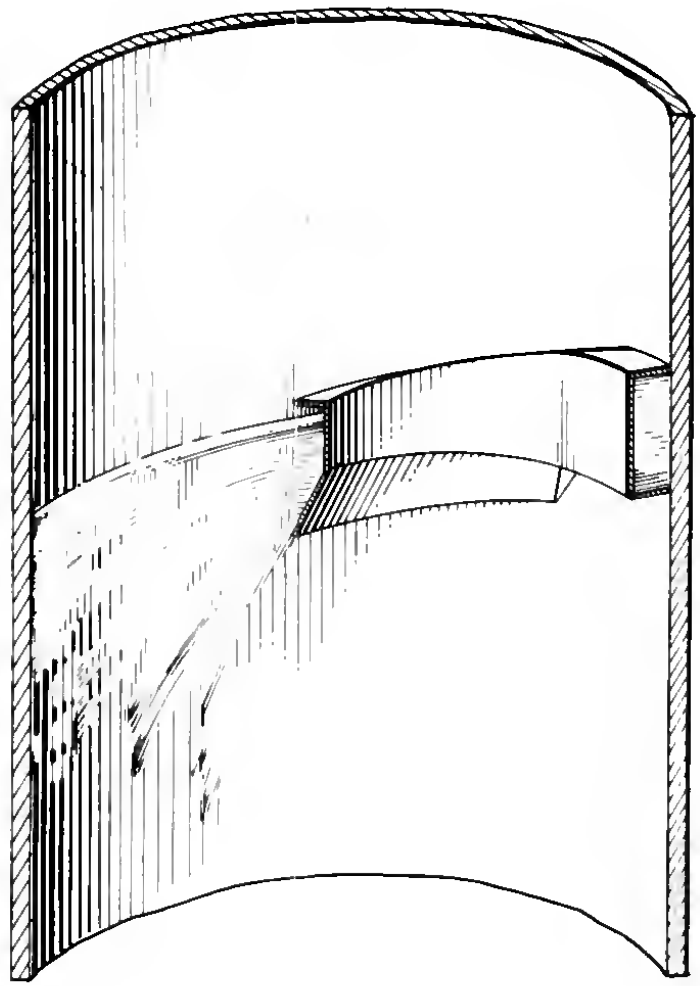
The filming (as decided by this court 290 Fed., one-third down page 57) is very complete in Cooper because of the slot-like nozzle at the end of the inlet pipe by which the oil is directed to the wal lof the Cooper trap. There is no such nozzle in defendant's devices charged to infringe: the oil reaches the expansion chamber through a broad opening with a wedge-shaped bottom, which directs the oil partially on the wall and partially to the bottom of the separator in a solid heavy stream, and any filming which may result by striking the wall is obviously merely incidental. Cooper is clearly, under plaintiff's present theory of infringement, much closer than defendant's devices charged to infringe. We urge that defendant cannot be found to infringe without finding that Cooper anticipates. *Plaintiffs have obliterated every possible difference from the prior art by which the shadow of validity of the Trumble patent was sustained by their present contentions as to infringement in the case at bar.* The following illustration comparing defendant's devices charged to infringe with Cooper, we present as conclusive:

COOPER Nº 815,407
Book of Exhibits
Case Nº 3945-Pg.133.



ALL OIL IS SPREAD ON WALL
See discussion 290 Federal Report
beging 1st paragraph pg. 57. Only difference
between alleged infringement is that oil inlet
pe is not extended on inside of separator.

Alleged Infringement in Case at Bar
Filming on the wall is not as complete as in COOPER.



Oil comes in a solid stream. The filming is much less complete than in COOPER.

We submit on this issue that the conclusion of Judge James in his opinion [R. 146, bottom of page] is correct:

> "In my opinion the apparatus is not reasonably an equivalent of Trumble's use of oil spreading baffle plates. I think to hold differently would be to allow a claim for the broadest kind of equivalents far beyond that permitted by a fair interpretation of the decision of the Circuit Court of Appeals."

The logic of ordering a dismissal of the bill on affirmance of the order appealed from, and of thus saving the parties to this suit the expense of further litigation, in view of the circumstances above outlined, we believe to be obvious. However, we submit the following authorities:

In *Victor Talking Machine Co. v. Starr Piano Co.* (C. C. A., 2nd Circuit), 263 Fed. 82, it was held:

> "The Circuit Court of Appeals, on an appeal from an order granting or denying an injunction in a patent infringement suit, is not confined to a review of the denial of the injunction, but may decide the case on the merits."

In *Co-operating Merchants' Co. v. Hallock et al.* (C. C. A., 6th Circuit), 128 Fed. 596, it was held:

> "Where it appears from the record on appeal from an interlocutory order granting a preliminary injunction, that the question of the validity of the patent involved is so fully presented that no amendment of the bill and no additional evidence could change or affect the final result, the court may order a dismissal of the bill."

In *Bell & Howell Co. v. Bliss* (C. C. A., 7th Circuit), 262 Fed. 131, the court decided:

> "An appellate court has power on a proper showing to direct dismissal of a bill, on an appeal from an order granting a preliminary injunction."

The license to the defendant corporation is entirely impertinent to any issue in the present controversy. This license covers, not two forms of traps as suggested in appellants' brief (page 13, line 1), but only one form, namely, that known in prior proceedings as Lorraine Model 16, counsel apparently being confused by the several figures of the drawings. Tanner No. 3 was a failure: Why take a license to repeat the failure.

This Model 16 was held by Judge Bledsoe, as we have seen, not to be an infringement even of the decree of Judge Wolverton before reversal.

The license does not require defendant corporation to make this Model 16 form of trap to the exclusion of other forms, in fact, there is no provision in the license agreement requiring the Lorraine Corporation to make a single device of the kind licensed. No royalty is provided for; and there was in fact no real or substantial consideration for the agreement. On a suit on the license we earnestly believe it would be declared void.

If a defendant, under a license, refused to pay royalty on devices manufactured and sold by it coming within the terms of the license, and suit were brought to recover such royalties, the law estopping licensee from denying validity might apply—and probably would apply if the license were a valid one, and not a mere subterfuge without consideration, by which, by covering devices which the court had previously found did not come within the scope of the patent, was obviously intended to be used by plaintiff in fraud upon the public.

Model 16 was found by Judge Bledsoe's decree *not to be an infringement of the patent in suit even as that patent had been construed by the decision of Judge Wolverton before reversal.*

The oil in this Model 16 falls through a screen and certainly, under the very decree which counsel invokes in the case at bar, could not be an infringement, because none of the oil is spread in any film whatsoever, the whole body of the oil falling in a great many streamlets to the oil pool below. This will be apparent from an examination of the drawings attached to the license as exhibits to the complaint.

We do not believe the law of estoppel would, under the peculiar circumstances of the giving of this license, have precluded defendant corporation, even in a suit on the license (if such were possible), from setting up as a defense that the license was void as being contrary to public policy—and also from relying upon the defense that the patent was void as covering Model 16 as well as for other reasons. But there is no provision in the license agreement to prevent licensee from making other forms of traps; and defendant in the case at bar has made such other forms not even pretended to be within the scope of the license. There is no principle of estoppel at all applicable.

It is not true, as stated in plaintiffs' brief near the bottom of page 6, that Judge Bledsoe decided on contempt proceedings that there was any substantial or other question whatsoever as to infringement of the Trumble patent by Model 16. All the court decided on such proceedings was that its manufacture and sale was not a violation of the injunction entered by Judge Wolverton. The court

expressly declined to decide whether the device was an infringement of the patent as construed by the Circuit Court of Appeals, such question not being within the issue. Judge Bledsoe said:

> "Without indicating any opinion as to whether or not Model 16 is an infringement of the patent as construed by the Circuit Court of Appeals, 290 Federal 54, at page 59, I am constrained to hold that it was not a violation of the injunction of Judge Wolverton, and that therefore the proceedings in contempt should be dismissed."

In conclusion we urge that no court ever exercised a dangerous discretionary power more wisely than did Judge James in the entry of the order appealed from.

We submit that the order appealed from should be affirmed with costs and that this court should direct the dismissal of the bill at costs of plaintiffs.

Respectfully,

WESTALL AND WALLACE,
By JOSEPH F. WESTALL,
Attorneys for Appellee.

No. 6076.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Co.,
Appellants,

vs.

Lorraine Corporation, a corporation,
Appellee.

APPELLANTS' REPLY BRIEF.

LYON & LYON,
FREDERICK S. LYON,
LEONARD S. LYON,
FRANK L. A. GRAHAM,
HENRY S. RICHMOND,
Attorneys for Appellants.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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Appellee.

APPELLANTS' REPLY BRIEF.

As stated in Appellant's Opening Brief, the only substantial question involved on this appeal is,—Has the lower court correctly interpreted and properly applied the decision of this Court (290 Fed. 54) in the previous case? Or did the lower court deny to the Trumble invention the scope adjudged to such invention by this Court? That this is the sole issue is emphasized in defendant-appellee's brief, page 4, where defendant-appellee says:

> "If the expressed conclusions of the trial court are adopted and approved by Your Honors there will be nothing further in this suit to litigate," etc.

As before pointed out, no subsequent testimony can materially change the case now before the Court on the

present record. These gas-traps or oil and gas separators are large enclosed devices. The precise manner of and results in operation must be determined by application of the principles of mechanics and physics incorporated in their mechanical construction. No one can see within one of these traps when it is in operation. Furthermore, it is not possible to determine from the exterior what is the internal construction.

Appellants submitted this case in the lower court upon the interpretation and decision of this Court in the previous case. Appellants herein rely upon such decision and such interpretation. Appellants submit that the two types or constructions of gas-traps last manufactured by the defendant-appellee and illustrated in the drawings, Fig's 5 and 6, Affidavit of William McGraw, and exemplified in physical Exhibits A-5 and A-6, comprise the combination of elements and instrumentalities organized in the relation and performing the precise functions adjudged by this Court in its former opinion to constitute the Trumble patented invention.

If upon the undisputed facts of this case, the lower court was wrong in its interpretation of the decision and adjudication of this Court in the former case, then the refusal of the injunction was reversible error. As said by this Court in *Sherman-Clay & Co. v. Searchlight Horn Co.*, 214 Fed. 99, after stating the general rule that the granting of a preliminary injunction in a suit for infringement of a patent rests within the sound discretion of the trial court and that under this rule the only question for this Appellate Court to determine is, "Had the court abused its discretion?" this Court says:

> "But another general rule applicable to the present case is that, the validity of the patent having been sustained by a prior adjudication in an action at law, and the infringement being clear, the court has no discretion to refuse a temporary injunction pending a final hearing upon the issues involved in the case."

Defendant-appellee does not deny that these two types or constructions are the latest products of defendant-appellee. In fact, it is admitted in appellee's brief (p. 16): "True, the last two traps finally relied upon were made only shortly before the suit was filed." Not only does this admission (adequately supported, without dispute, by the affidavits of the respective parties) dispose of all assertion of laches on the part of appellants, but it is the most cogent evidence of the commercial value of the Trumble invention. The step-by-step encroachment upon the particular combination of mechanical means and instrumentalities so adjudged by this Court to constitute the Trumble invention totally impeaches defendant-appellee's words of belittlement. "The proof of the pudding is the chewing of the string." Defendant-appellee now asserts that the Tonner No. 3 infringement was a mere unsuccessful abandoned experiment. Yet, although the other three constructions adjudged by this Court in its former opinion not to infringe were open to defendant-appellee's free manufacture, and notwithstanding all of the praise that was given thereto by defendant-appellee at the prior hearing—lauding the commercial success and efficiency thereof—these stand in fact abandoned by defendant-appellee. Many other types and constructions have been tried, many of such other traps sold and put in use, but the Court has before it no explaining away by defendant-appellee of the commercial and mechanical necessities

which have clearly driven defendant-appellee to a re-adoption of the Trumble invention so clearly evidenced by the continued closer and closer approximation of the particular combination adjudged by this Court to have been Trumble's invention. Appellee seeks to secure the important advantages of Trumble's combination but retains some colorable change of form to disguise its piracy. It seeks to appropriate the substance but conceal this by mere change of form. That years of experience drive it to this necessity conclusively proves the merit of Trumble's inventive thought.

Without regard to the previous decision and decree being *res adjudicata* and binding upon defendant-appellee, as it is binding upon plaintiffs-appellants,—such prior adjudication is sufficient to entitle the appellants "to a preliminary injunction in a suit for infringement" "prior to a trial on the merits," as stated in the rule of this Court's decision at page 61 of 182 Fed. Rep., in the case of *Kings County Raisin & Fruit Co. v. U. S. Consolidated S. R. Co.* The rule there applied is that the patent owner "must show three things: First, a clear title to the patent; second, its presumptive validity; and, third, threatened infringement by the defendant." The Court then quotes from the opinion of Judge Hawley in *Norton v. Eagle Automatic Can Co.*, 57 Fed. 929:

> "I understand the rule to be well settled that where the validity of a patent has been sustained as in this case, by prior adjudication in the same circuit, the only question open before the court on motion for a preliminary injunction, in a subsequent suit against other parties, is the question of infringement, and that the consideration of all other questions should be postponed until all of the testimony is taken in the

> case and the case is presented upon final hearing. There is, perhaps, an exception to this rule—that in cases where new evidence is presented that is itself of such a conclusive character that, if it had been presented in the former case, it would probably have led to a different conclusion. The burden, however, of showing this, is upon the respondent."

The present appeal presents an even narrower issue, to-wit: Did the lower court apply in this case the interpretation and scope of the Trumble invention adjudged thereto by this Court in the previous hearing?

As before pointed out, no subsequent testimony is available to change the record on the issue of infringement. Both parties seem in accord on this point.

Could defendant-appellee escape from the pleadings and the facts, and escape from the rule of *res adjudicata* (adjudicating between the parties hereto the validity and scope of the Trumble invention), the foregoing rule would still apply, and only that portion of the rule thus expressed by Judge Hawley, of "new evidence," be open for determination, as to which the burden of proof would be upon the defendant-appellee. And there is no "new evidence;" solely an issue of infringement.

Before replying to the defendant-appellee's contentions, we deem it a duty to point out to the Court the erroneous and highly misleading character of the statements contained in defendant-appellee's brief; also some of the glaring inconsistencies, both of statements of alleged facts and of argument.

(1) A reading of defendant-appellee's brief leaves it impossible to determine therefrom whether defendant-appellee intentionally asserts that there are only two gas-

traps that have been made by defendant-appellee which are charged to be an infringement. Such inference is plain. It is true that there are only two types of such traps, *i. e.,* the last two types or constructions so first produced by defendant-appellee within a month prior to the filing of the bill of complaint in this case and the making of the motion for temporary injunction. But defendant-appellee's brief says (p. 12):

> "However, the point we are now endeavoring to present and emphasize is that *only two traps are charged to infringe*—a trifling basis for a cry of irreparable injury."
>
> (Italics are reproduced from appellee's brief)

On page 13 this brief proceeds with the assertion that defendant was "putting out $67,000.00 worth of traps per month."

And just before this statement the brief again asserts:

> "* * * plaintiffs finally admitted that only two traps made during a year could, under any theory, sustain the charge" (of infringement).

We submit these statements for this Court's careful notice and consideration. How many traps like Exhibits 5-A and 6-A, or Figs. 5 and 6 of the McGraw affidavit, have been made by defendant-appellee, or whether it has been manufacturing and installing such traps for a long time prior to the discovery thereof by plaintiffs-appellants within a month of the filing of the bill of complaint herein, —plaintiffs-appellants do not know. In plaintiffs' bill of complaint plaintiffs pray discovery of this number. The

fact remains undenied—yes, admitted—that this is the newest and latest type of construction of the defendant-appellee. No reason is given by defendant-appellee for the production of this type of trap. No denial is made by defendant-appellee that it is the type of trap that it intends hereafter to manufacture to the exclusion of all others.

It is anomalous that, with a successful business (as asserted) of $67,000.00 per month in non-infringing and in licensed traps, the defendant-appellee should now find a compelling necessity for such a close approximation of the Trumble invention.

But defendant-appellee does not content itself with this assertion, for on page 14 occurs:

> "Two traps out of many thousands—the utmost frankness and good faith in fully disclosing features of construction to plaintiffs. Surely, even assuming possible infringement, this insignificant trespass is too trifling to form the basis of a preliminary injunction."

Notwithstanding all these words about defendant-appellee's tremendous business and its commercial success, the record in this case is totally silent on the part of defendant-appellee of any explanation whatsoever of why it has been driven to this re-adoption and re-infringement of the Trumble patent.

But it is not true that this case involves only two traps out of many thousands (Appellee's Brief, p. 14). Defendant-appellee has shown the intention to infringe; the intention to continue making and selling the two types of infringing trap. An injunction is to prohibit future trespass. The past will be taken care of in an accounting,

during which the evidence as to the number of such traps of these two types will be educed. Proof of one is all that is required or material for the injunctional relief.

If, after many years of litigation and many years of commercial production and use, the defendant-appellee is shown to have reverted from the non-infringing constructions to a construction which in substance embodies the combination which this Court has determined is the Trumble invention, not only does such fact prove conclusively the commercial value of such Trumble invention, but it proves conclusively the necessity for, and the right of appellants to, injunctional relief to prevent the appropriation of their adjudged patent property.

(2) *Laches.* In one breath (Br., bottom of p. 5) appellee asserts that the right to a preliminary injunction is barred because of "laches for over a year." The admission of appellee (Br., p. 16) that the two types of traps involved "were made only shortly before the suit was filed," fully answers this contention.

This is another example of appellee's inconsistencies.

(3) Appellee asserts, in large type (Br., p. 9), that, "Gas traps are large contrivances" "easily kept track of." But it is to be noted that nowhere in appellee's brief is there any attempt made to point out any evidence that the interior construction of these gas-traps can even be guessed at by viewing their exterior appearance. The fact is that the interior construction can only be determined by partially dismantling a trap and by a man crawling thereinto; that it is impossible to observe the operation; that the mode and principles of operation can only be determined by an analysis and consideration of the principles of me-

chanics employed and the laws of physics involved. The inferences plainly apparent throughout appellee's brief are calculated to mislead the Court to a conclusion that there is no difficulty in providing direct proof as to the actual operation of the infringing traps; that such operation is easily discernible. This is entirely inconsistent with appellee's contention that, "If the expressed conclusions of the trial court are adopted and approved" "there will be nothing further to litigate." "We can find no substantial issue of fact."

(4) Appellee asserts that a contempt proceeding would have been the proper procedure (Brief, p. 20) and that the filing of an original bill in a new suit constitutes an admission that the decree in the original suit is not *res adjudicata*. This contention is interwoven in appellee's brief with appellee's misrepresentation respecting the contempt proceedings which were instituted in the original suit and which were dismissed by Judge Bledsoe under the rule that the court will not in or by contempt proceedings adjudge a subsequent infringement unless it is a mere colorable evasion; that if the new infringement raises a substantial issue to be tried, then the Court will relegate the parties to either a new suit or to an application for a new and an extended injunction. This is the rule which has been established in the United States District Court for the Southern District of California. It is the rule which is generally applied in patent cases in the various circuits and districts. It is because of such rule that appellants brought this new suit so as to put this issue of infringement squarely before the Court, and not merely as an incidental issue in a contempt proceeding.

But, appellee misrepresents the facts respecting the contempt proceeding so terminated by Judge Bledsoe.

At the bottom of p. 18 of appellee's brief it is said:

> "The defendant, however, was purged of the alleged contempt—and said Model 16 was found not an infringement of Judge Wolverton's decision, ***broad as it was, before reversal by this court.***" (Italics reproduced from said brief.)

Judge Bledsoe's decision was not rendered before the decision of this Court on June 4, 1923 (290 Fed. 54). Whether appellee's misstatement is intentional, or through gross carelessness, can hardly be questioned. Appellee's brief, p. 3, gives the correct date of said decision of this Court,—June 4, 1923,—and following the above quotation from p. 18 of appellee's brief appellee refers to the Transcript of Record in this case, page 142, at which appears the contempt proceeding decision of Judge Bledsoe, at the close of which (p. 143) is definitely printed the date, "June 30, 1924," as well as the endorsement of the clerk, "Filed Jun. 30, 1924."

Judge Bledsoe's decision refers to "the injunction of Judge Wolverton." This is technically an error. After the decision of this Court and pursuant to the mandate, a new interlocutory decree was signed by His Honor, Judge James, in accordance therewith. It was this decree and this injunction that was under issue. But how does appellee justify its point-blank assertion that Judge Bledsoe was giving the case Judge Wolverton's interpretation, *"broad as it was, before reversal by this court"?* Judge Bledsoe in his opinion [Tr. Rec. p. 142] says:

> "Without indicating any opinion as to whether or not Model 16 is an infringement of the patent as con-

strued by the Circuit Court of Appeals, 290 Fed. 54, at page 59."

It must be borne in mind by the Court that the facts of these former contempt proceedings were interjected into this suit by appellee. Doubtless this was for the purpose of influencing the Court as to what had been previously determined. Appellee makes the wrongful assertion that Judge Bledsoe determined that issue of infringement on the merits. Otherwise than as showing defendant-appellee's erroneous contention and misrepresentation of the character of such proceedings and of the fact that such proceeding did not decide the issue of infringement, such contempt proceedings are immaterial and irrelevant to the present suit.

(4) Appellee admits (Br., p. 24):

"If defendant Lorraine Corporation was in privity with Lorraine individually as regards the subject-matter of the prior suit, of course such corporate defendant would be bound by the perpetual injunction entered against Lorraine individually," etc.

Appellants have pointed out (p. 4 of appellants' opening brief) the allegations of the bill of complaint and the admissions of defendant's answer that during the pendency of said original suit the defendant therein, David G. Lorraine, transferred his then existing business in the manufacture of crude petroleum and natural gas separators to the defendant Lorraine Corporation, which corporation thereupon became the successor of said David G. Lorraine in the manufacture of crude petroleum and natural gas separators, and continued to and participated in the defense of this suit. Although appellee seeks to avoid the

legal effect of these facts and admissions (Br., p. 19, *et seq.*), it admits:

> "The Lorraine Corporation at the time of its organization (May 1, 1923) took over what is conceded in this proceeding to have been the largest organization for the manufacture and sale of gas traps in the world." (p. 21.)

The decision of this Court in the original case was June 4, 1923, approximately seven weeks thereafter, but the original suit was not then concluded. Thereafter there was a new interlocutory decree entered pursuant to the mandate of this Court; there were contempt proceedings instituted in said Court involving the "Model 16" type of traps, after defendant-appellee had abandoned the manufacture and construction of the types involved in the original suit; there was thereafter filed a supplemental bill alleging infringement by such "Model 16" type of traps; there were accounting proceedings; and it was not until 1926 that the final decree was entered and filed. The entry of this final decree was participated in by the defendant-appellee, Lorraine Corporation. This is directly reflected by the agreement [Tr. Rec. p. 109]. During all this time, from May 1, 1923, to April, 1926, the defendant-appellee "continued to participate in the defense of said suit."

It was the defendant-appellee that was the manufacturer of the "Model 16" traps involved in the contempt proceedings; it defending said proceedings.

Notwithstanding these admitted facts, and the solemn admissions of the pleadings, defendant-appellee says:

> "The only 'participation' of defendant corporation, if it can be possibly designated as such, consisted of assuming and paying, as consideration for

> the transfer of the business to it, certain of Lorraine's individual expenses in connection with the suit, long after the case had been tried, decided, appealed, briefed, argued, and submitted for the decision of this Court of Appeals." (Br., p. 20.)

and reiterates:

> "There is nothing remotely resembling privity between Lorraine and the Lorraine Corporation relating to the subject-matter of the adjudication in the suit against Lorraine individually, as there was no transfer by Lorraine individually to the corporate defendant of even a single trap which had been held to constitute an infringement upon the Trumble patent in suit." (Br., p. 25.)

Defendant-appellee contents itself with these inconsistent statements and misrepresentations of the facts. It is significant that defendant-appellee does not question (and it cannot successfully) the established rule of law that defendant-appellee having purchased May 1, 1923, *pendente lite,* the gas-trap business of Mr. Lorraine, thereby became completely bound by the adjudication. See page 5 of appellants' opening brief. This rule is so well established that we hesitate to cite further decisions applying the rule.

(5) Defendant-appellee misrepresents the facts in regard to three constructions of traps before this court in the original suit. (See the illustrative drawings opposite page 31 of appellee's brief.) All three of these were held by Judge Wolverton to infringe. Is this gross carelessness, or what is appellee's motive and intent?

The same misleading and incorrect endorsement is found at the bottom of the two respective drawings inserted opposite page 32. Judge Wolverton decreed both

to infringe. This court agreed with him as to "Tonner No. 3," but reversed him as to the Lorraine patent construction, so in appellee's brief denominated "Model No. 1." Can it be that this error is mere carelessness, or was it for the purpose of confusing this court? We refer the court to the next to last paragraph of page 59 of *290 Fed. Rep.*, where this court refers to Tonner No. 3 as "apparently designated in the decision of the court below as Model No. 1."

If such errors, such carelessness of facts, such misleading statements are made in material portions of appellee's brief, is there not good ground for this court's dealing cautiously with all assertions and contentions advanced by appellee and checking each carefully before relying thereon?

(6) Defendant-appellee now contends, as it did in the original case (see this court's opinion, 290 Fed. Rep., last paragraph, p. 55) that the Trumble invention must be limited to a combination "where the *whole* body of crude oil is spread *equally* in a *thin film* upon the conical spreader-plates and upon the entire chamber wall intermediate between them and the pool level." This court did not sanction such restriction. (See page 59, next to last paragraph.)

Now in its brief defendant-appellee asserts to Your Honors that:

> "All the oil is also spread in Model No. 2 with the nipple machined off, one of the devices found not to be infringed by this court." (Br., bottom p. 33.)

Why does defendant-appellee misstate the facts?

This court in its previous decision adopted the defendant's assertions of its brief in the original case, where under the caption, "Defendant's Model 2 does not infringe," on page 90, defendant says:

> "It would seem obvious that the oil coming through the inlet opening 4 *must* in large part fall to the bottom of the separator without striking the walls at all. Indeed, the trial court distinctly so found, stating (near the top of page 538 of the transcript of record) that part of the oil descends 'by gravity *without reaching either wall.*'" (Italics defendant's.)

See further appellants' opening brief herein, p. 16.

(7) Opposite page 43 of appellee's brief there has been produced by appellee an alleged drawing of the type of trap here involved as infringement. This is not a reproduction of any drawing-exhibit to the affidavit of William McGraw. It is a purely argumentative drawing composed by appellee and imprinted with legendary matter unsupported by the physical exhibits A-5 and A-6. We ask Your Honors to carefully inspect these two physical exhibits before relying upon this drawing or its legends as they appear in appellee's brief.

(8) Repeatedly appellee makes the assertion that there was only one trap of the Tonner No. 3 construction made. It is true that in the hearing before Judge Wolverton only one was proven. That was sufficient for determination of the issue of infringement. On the accounting we had the evidence to prove others. This is another illustration of the erroneous character

of appellee's contention that our present showing is not sufficient to require injunctional relief. Appellants require an injunction to prevent further construction and the process of the court on accounting to discover and prove the number, etc., of infringing traps heretofore made by defendant-appellee. Appellants cannot otherwise discover this, unless all such traps are removed from use and junked. Then, by chance only, they may be available for appellants' inspection.

(9) Appellee asserts now, as before in the original case, that:

> "There is actually no advantage in the Trumble imperforated cones over those of Bray, not to speak of Fisher, Newman, Cooper and others." (Printed in italics in appellee's brief, p. 41.)

It is passing strange, if there be no advantage in the imperforate spreading surface or cone, that appellee has not adopted a perforated surface having the function and made of operation of the Bray cones. No liability for infringement could possibly be incurred thereby, if appellee adopted the Bray principle and relation of parts. But appellee's conduct belies its words. Appellee's "Model 16" traps utilized a perforated plate or bottom through which the oil dropped in drops or streamlets. (See appellants' opening brief, p. 17, and the perforations 4 of the fourth drawing of illustration at end of such brief.) Appellee has apparently abandoned such construction.

Appellee thereafter produced the type of trap of Fig. 3 of the McGraw affidavit (the seventh from the left, of appellants' said illustrations). See appellants' opening brief, p. 18. This trap was provided with perforations or holes through which the oil might or could so drop.

Yet, appellee vouchsafes no explanation for abandoning this construction, or any explanation for proceeding to the infringing constructions with imperforate spreading plates.

(10) Appellee misconstrues the decision of this court as to the scope of the Trumble invention.

This court said (290 Fed. at p. 59):

> "* * * the claims are to be read only upon apparatus by which substantially the whole body of oil is spread as a film or thin sheet on a backing wall, and is not, in the course of the process of separation, broken up by any means into drops or streamlets;"

As stated in appellants' opening brief, in the infringing types of traps the whole body of oil is spread on the inner surface of the wall of the trap. In this connection we call the court's attention to the physical Exhibits A-5 and A-6 and to the drawing opposite page 21 of appellants' opening brief. Not only is the whole body of oil spread as a film or thin sheet on the inner curved surface of the tank wall as a backing wall, but in these infringing types of traps the bottom of the expansion chamber or enclosed trough is provided with an end baffle 6 which is pitched downwardly and toward such inclined wall and thereby the spreading of the oil on this interior surface of the trap wall, as a backing wall, is positively insured. With this infringing type of trap, the body of oil "is not, in the course of the process of separation, broken up by any means into drops or streamlets."

What in appellee's brief, p. 42, is termed "the spiral extension," *i. e.*, the trough, open at the side toward the

circular wall of the trap, forms in actual effect, both as to location and volume, an expansion chamber, and the function of the walls and formation of this trough not only is to reduce the velocity of the incoming oil but to cause all of it to be spread in a thin film onto the inner surface of the tank wall. If the court judges the question of infringement by the three functions attributed in appellee's brief (p. 42) to the Trumble cone, equivalency is demonstrated and infringement proven. Appellee says that the Trumble cone performs three functions:

> "(1) It checks the velocity of the incoming oil;"

This is the function of the expansion chamber formed by the said trough.

> "(2) it spreads the oil thinly over its own extended surfaces;"

This is also true because of the increase of volumetric capacity. The arrangement is such as to cause, by reason of the spiral shapes or contours, the oil to be spread from the bottom and sides of the trough onto the curved inner surface of the trap-wall.

> "(3) it conveys the oil to the wall of the separator, theoretically, at least, equally at all points, thus continuing the film from the apex of the cone to the oil pool."

Similarly this mechanical means, the trough, by means of its bottom and side-wall in the same sense conveys the oil to the wall of the separator. It there spreads the oil onto that wall. It conveys the film of oil from the beginning of the trough to the time the oil flows down the inner wall into the pool of oil at the bottom. And this trough is

provided with the end baffle 6 which insures that substantially all the oil is spread upon the curved inner surface of the trap-wall down which it will flow in a relatively thin film into the oil-pool below.

We find, therefore, that the particular several mechanical means which this Court has adjudged in its previous decision to constitute the Trumble invention are utilized in the infringing traps, and these means in such infringing traps are so combined that they perform substantially the same function in substantially the same manner. Equivalency is absolutely present and proven. We respectfully refer this Court to the conclusion of this Court in its former opinion. Having found what is the invention, there need be no difficulty in determining what is the equivalent. This is made clear by the Supreme Court of the United States in its recent decision in *Sanitary Refrigerator Co. v. Winters et al.* (decided October 14th, 1929). In this case the Court reversed the decree and held the patent infringed. The Supreme Court adjudged the invention to be a narrow one. It said:

> "Although the claims of the Winters and Crampton patent are limited to the structure therein disclosed, we find that they are infringed by the device of the Dent latch. Both Circuit Courts of Appeals recognized that the Winters and Crampton patent, although thus limited, had some range of equivalents; and we think that, though it be a narrow one, it is sufficient.
>
> "There is a substantial identity, constituting infringement, where a device is a copy of the thing described by the patentee, 'either without variation, or with such variations as are consistent with its being in substance the same thing.' *Burr v. Duryee,* 1 Wall. 531, 573. Except where form is of the essence of the invention, it has little weight in the decision of such an issue; and, generally speaking, one device is

an infringement of another 'if it performs substantially the same function in substantially the same way to obtain the same result . . . Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish the same result, they are the same, even though they differ in name, form or shape.' *Machine Co. v. Murphy,* 97 U. S. 120, 125. And see *Elizabeth v Pavement Co.,* 97 U. S. 126, 137. That mere colorable departures from the patented device do not avoid infringement, see *McCormick v. Talcott,* 20 How. 402, 405. A close copy which seeks to use the substance of the invention, and, although showing some change in form and position, uses substantially the same devices, performing precisely the same offices with no change in principle, constitutes an infringement. *Ives v. Hamilton,* 92 U. S. 426, 430. And even where, in view of the state of the art, the invention must be restricted to the form shown and described by the patentee and cannot be extended to embrace a new form which is a substantial departure therefrom, it is nevertheless infringed by a device in which there is no substantial departure from the description in the patent, but a mere colorable departure therefrom. Compare *Duff v. Sterling Pump Co.,* 107 U. S. 636, 639.

"The fact that, as the Dent device makes two reciprocal changes in the form of the Winters and Crampton structure, one by the insertion of the lug on the keeper head, and the other in the shortened upper arm of the latch lever, and one alone of these changes cannot be substituted in the Winters and Crampton structure without the other, so as to make it operative, is plainly insufficient to avoid the infringement."

There is nothing substantially new in this decision. It is, however, a perfect example of the application of the law. Having found what is the "invention," the doctrine of equivalents applies to that "invention" whether broad

or narrow. This Court in its previous decision in holding Tonner No. 3 to infringe applied the very rule so applied by the Supreme Court. And so, applying the same rule and the same tests, an adjudication of infringement herein necessarily follows.

The Prior Art Patents.

Should the Court desire to review the prior art patents, it will find that all of these were before this Court in the former case. It will find these discussed in Plaintiffs-Appellees' Opening and Reply Briefs in that case. We shall not therefore discuss each of these patents in detail.

Bray Patent No. 1,014,943.

This patent is discussed in the former opinion of this Court. On page 33 of Appellee's Brief it is stated that Trumble's invention "only consists of plugging the holes in Bray's cones." This statement is absolutely incorrect. The cones of the Bray trap came into contact at their peripheries with the inner surface of the wall of the vessel. Therefore, if there were no holes in the Bray cones the oil would remain above the cones and never pass to the bottom of the receptacle. The mode of operation is different and the combinative relations of the several mechanical means or instrumentalities is different.

Cooper Patent No. 815,407.

In the Cooper patent there is nothing equivalent to the closed trough or runaround baffle-plate of the defendant's infringing devices. In other words, there is no provision for a slowing down and initial separation of the oil and gas prior to the delivery of the mixture onto the wall of

the separator and into the open chamber thereof comparable either to the infringing traps or to the Trumble invention. On the contrary, Cooper discharges the injected mixture of oil and gas directly from the delivery pipe B through an elongated nozzle-shaped opening against a wearing-plate fixed to the inner wall of the cylinder which, undoubtedly, would have a splashing effect due to the delivery of the mixture against the wearing-plate in contradistinction to first quieting down the moving oil in an initial expansion and quieting chamber and spreading it on the wall in a film, as in defendant-appellee's infringing traps, so comparable in this respect to the mechanical means and mode of operation of the Trumble invention. We thus see again the absence in the Cooper device of the mechanical means which this Court adjudged to be of the essence of the Trumble invention and which is reproduced in equivalent form in the infringing traps, Exhibits 5-A and 6-A, or drawings Fig's 5 and 6 of the McGraw Affidavit.

Newman Patent No. 856,088.

This patent was also an exhibit in the previous case. Appellee's Brief, p. 34, misstates the mode of operation of this device. Therein it is stated that the oil entering through a single pipe has its velocity reduced by being divided by four pipes G1 into four streams, and that

> "It then falls in such four streams upon the wedged shaped spreader K1, is deflected to the side walls of the separator down which it flows to the oil pool below."

The Newman patent is for an improvement in ***water*** and gas separators. It is stated (at line 10, p. 1) that

the object is to distribute the force of gas especially in high pressure so as to eliminate the spray and give the water a chance to collect and settle at the bottom of the tank. Beginning with line 84, p. 1, the patent states:

> "the gas entering the top of the tanks through the pipes G and H, is divided again by the distributers G2, H2, and strikes the hoods K′, L′ *preventing the gas from boiling up the water accumulated in the bottom of the tank* thus preventing much spray and protects the float M from incoming rush of gas," etc.

This shows that the hood K′ is not designed for, or intended for, the purpose of, or intended to be capable of, spreading the water to the side-walls of the trap in a film. On the contrary, this was designed for interposing an obstruction between the incoming gas at high pressure and the body of water accumulated in the bottom of the tank preventing the jetting of such gas into such water, thereby preventing the gas from having a stirring effect. Also for the purpose of preventing the gas from striking the float when used.

Appellee's modified form of the Newman device, suggested opposite page 35 of appellee's brief, is an attempt, after having knowledge of the Trumble invention and patent, to alter the construction and modify the construction and arrangement of parts shown in the Newman drawing, to make such modified drawing incorporate some semblance of the Trumble invention. But this court will not adjudge the patentable novelty of the Trumble invention by such theoretical modifications and re-arrangements made after and in the light of the Trumble invention, but will apply the rule that a prior patent is only to be considered as anticipatory for that which it actually shows.

What it actually teaches and the mode of operation it teaches is the mode of operation stated in the Newman patent, not a modification made for argumentative purposes.

The illustrative drawing appearing opposite page 35 of appellee's brief is entirely misleading. And the purported comparisons of the Newman and Tonner No. 3 appearing opposite page 36 are misleading, because the walls of the trap in each instance are omitted, and without an illustration of the curved walls of the trap and the functional relation of the illustrated devices to the inner surface of the trap, comparison with the functional relationship of the spreading cone or baffle of the Trumble invention is impossible.

Taylor Patent No. 426,880.

Opposite page 37 of appellee's brief is a purported illustration of a part of the drawings of this patent, and appellee asserts that this drawing "shows the liquid coming into a separator and being immediately spread upon a series of inclined baffle plates in a thin film." What is it that is to be so spread by the Taylor patent? The Taylor patent is for an improvement in Steam Separators. The patent states, beginning with line 13, page 1:

> "The object of my invention is to provide a novel apparatus for separating the water of condensation from live steam and eliminating therefrom the particles of grease, oil, or other impurities taken up by the steam in passing from the boiler to the steam-chests of the cylinders."

This statement immediately distinguishes the Taylor patent from the Trumble invention. An entirely different problem is solved by the Trumble invention. This will be

more clearly understood by reference to page 1, beginning with line 72, of the Taylor specification, which describes the operation of Taylor's steam separator:

> "As the live steam enters by way of the pipe 3a, it is compelled to flow downward over the surfaces of the baffle-plates 4, whereby any condensations of vapor or particles of oil or grease carried by it are deposited and caused to adhere to said plates, whence the fluid trickles downward and falls into the chamber 8, while the dry and pure steam enters the mouth of the conveyer 6 and passes to the engine."

This operation is not comparable at all to the Trumble gas-trap. This operation may be compared to blowing one's breath against a pane of glass and the consequent accumulation of moisture on the glass. Clearly, the Taylor patent was not designed for the same purpose, nor does it actually accomplish the same purpose, as the Trumble invention. In the device of the Taylor patent the steam carrying impurities is admitted to the separator and such impurities are separated by the action of blowing the steam against the inclined surfaces. But there is no filming of substantially the whole body of oil on the wall of a gas-trap for the purpose of extending the body of oil and permitting the entrained gas to escape therefrom. It is hard to conceive that the Taylor patent can be adjudged to be in an analogous art.

With respect to this prior art, appellants respectfully submit that there is nothing in it to change the conclusion of this Court as expressed on page 59 of 290 Fed. Rep. Comparing either or both the mechanical construction and interrelation of parts and functions of the Tonner No. 3 trap or the trap of the Trumble patent with defendant-appellee's infringing traps illustrated in Ex-

hibits 5-A and 6-A or Figs. 5 and 6 of the drawings attached to the McGraw affidavit, it is clear that the combination of elements, the functions and mode of operation are the same. Defendant-appellee's infringing traps have, by the mechanical means of the enclosed trough or runaround baffle open at its side adjacent the trap wall whereby the oil is filmed on the interior curved surface of the trap wall, adopted the full equivalent of the Tonner No. 3 baffle or Trumble spreading cone. The walls of said enclosed trough or runaround baffle are the mechanical means causing the spreading of the oil onto the interior curved trap wall surface, and the provision at the end of this trough or runaround baffle of the inclined separator plate or baffle 6 certainly completes full equivalance in the same sense, both as to mechanical construction or means and as to functional relation, as did the baffle-plate of Tonner No. 3 so referred to by this court in its opinion.

Thus, as to mechanical means, as well as cooperative function, the infringing traps differ from the prior patented art relied upon by appellee in the same respects as do the spreading means, *i.e.,* spreading cone of the Trumble patent and the baffle of Tonner No. 3.

Appellants respectfully submit that the lower court erred in its interpretation of the scope of the Trumble invention. That the lower court erred in its interpretation of the decision of this Court. And that the order appealed from should be reversed.

In closing, it seems fitting to urge to Your Honors an outstanding fact which should be given due weight. Notwithstanding that defendant in the original case belittled the importance of the Trumble invention and sought to

impress this Court with that view, the fact remains that seven years later, and while the Trumble invention has had an important place in this art for sixteen years, defendant-appellee, although free to use many other trap constructions, is forced to pirate this limited invention. This conclusively demonstrates the importance of the Trumble invention. Throughout all these years the Trumble invention has maintained its beneficial place in the practical art. It has neither been abandoned nor superceded. It is such inventions, so tested out, that should and do recommend themselves to the courts for protection. As said by Judge Coxe in *Hallock v. Davison,* 107 Fed. 482, 486:

> "If there be one central, controlling purpose deducible from all these decisions, and many more that might be quoted, it is the steadfast determination of the court to protect and reward the man who has done something which has actually advanced the condition of mankind, something by which the work of the world is done better and more expeditiously than it was before."

Respectfully submitted,

LYON & LYON,
FREDERICK S. LYON,
LEONARD S. LYON,
FRANK L. A. GRAHAM,
HENRY S. RICHMOND,
Attorneys for Appellants.

No. 6076.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm of Trumble Gas Trap Co.,

Appellants,

vs.

Lorraine Corporation, a corporation,

Appellee.

APPELLEE'S RESPONSE TO APPELLANTS' REPLY BRIEF.

WESTALL AND WALLACE,
By Joseph F. Westall.
Attorneys for Appellee.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No. 6076.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm of Trumble Gas Trap Co.,

Appellants,

vs.

Lorraine Corporation, a corporation,

Appellee.

APPELLEE'S RESPONSE TO APPELLANTS' REPLY BRIEF.

Because of outrageously question-begging assumptions and misleading statements of fact in Appellant's Reply Brief, we have asked and there has been granted to us by Your Honors the right to file this reply:

One of the most glaring and inexcusable of direct misrepresentations is that contained in the bottom of page 9 of Appellants' Reply Brief where counsel assert in italics that it is not true that this case involves only two traps out of thousands. This italicized statement, however, is immediately shown to be without foundation by careful study of the text immediately following which shows only that plaintiff *suspects* that defendant may continue to

make other traps like the two questioned. Counsel admit that an accounting will take care of the two traps; but seek the injunction solely because of a *mere possibility* that defendant will make others like them. *There is not a scrap of evidence to support such possibility,* which, even if it exists, would not warrant any inference of irreparable injury; on the contrary circumstances most cogent militate conclusively against the possibility that defendant will continue to make any more like the two traps finally, after much hesitation, settled upon to support the charge; thus, in the first place, it is admitted that defendant made millions of dollars worth of traps (including the four of the six withdrawn from the charge) *which did not infringe.* The four traps first relied upon, but finally admitted by counsel not to be infringements, are very similar to those finally relied upon.

When defendant has demonstrated that the alleged Trumble invention amounted to so little that he could build up what is conceded to be the largest business in the world in the sale of traps *which admittedly did not contain it,* is it reasonable to suspect that defendant will make any great number of the form now questioned, until this controversy is decided?

But we seem to hear the court asking: Why so earnestly resist an injunction limited to only two forms of traps when it appears so easy for defendant to avoid even a question of infringement by confining operations to the many-formed admittedly not infringements.

We answer by a similar inquiry: Why insist upon an intrinsically worthless injunction—one so limited that de-

fendant's business is in no manner apparently interrupted by it?

Here is the answer to both questions: Any kind of an injunction will injure the good-will of defendant and will correspondingly enure to the business advantage of plaintiff. The scope will not be understood—will be easily misrepresented. Plaintiff may be required by some purchasers to give bond to protect them from a charge of infringement by plaintiffs, *even in the case of traps clearly and admittedly not infringements.* The trifling amount of infringement, the concealed nature of the alleged infringement inside of trap, all these facts point—not to irreparable injury to plaintiff upon failure to grant an injunction but to irreparable injury to defendant if such injunction be granted. The mere fact that the court has found something to enjoin is enough for some purchasers. The result is that many purchasers will require security against infringement and this greatly burdens defendant and gives plaintiff a corresponding advantage in the selling field in a closely competing business.

On the other hand if an injunction is denied these devices being large and costly contrivances can be easily kept track of on any possible accounting and thus full justice be done to plaintiff.

The alleged infringement actually relied upon is too small for the dignity of the court, and there is positively no evidence of any intention on the part of defendant to continue to make the forms in question, even assuming that they infringe.

As showing how far plaintiffs will go in groundless proceedings for the purpose of business advantage: We

have in our Opening Brief referred to Model 16 of Lorraine which on contempt proceedings before Judge Bledsoe was charged to be an infringement, and, consequently, a violation of the previous injunction. The charge was simply outrageous. In order that the court may see this in the light of the present record let Your Honors look at the drawing of this device shown forth from the right-hand side of the photostat page in the back of appellants' brief.

In this Model 16 the oil inlet is marked on the drawing. The pipe which extends into the separator into a closed box or receptacle in the bottom of which is a screen with 57 holes in it. There was no possibility of the spreading of anything on any surface. The oil falls in a solid stream from the opening in the bottom inlet pipe as shown in the drawing and upon striking the screen was splashed and broken up into many drops and streamlets; yet the matter was held in court for a long time while plaintiffs made as much capital as possible out of its pendency.

In the middle of page 18 Appellants' Reply Brief it is said:

> "It is passing strange if there be no advantage in the imperforate spreading surface or cone appellee has not adopted a perforated surface having the function and mode of operation of the Bray cones. No liability for infringement could possibly be incurred thereby if appellee adopted the Bray principle and relation of parts."

The action of the plaintiffs in charging contempt in the use of Model 16 belies such statement and shows conclusively that plaintiffs are willing to charge infringement by any kind of device, regardless of consistency, merely for

the purpose of litigation, and with the hope of confusing the court and thus securing a grossly erroneous decision.

It is true that the court will enjoin misuse of its process; but it is quite difficult, uncertain, and cumbersome to prove such things and the court is often powerless to control a grievous injustice caused by the prosecution of a groundless suit. The courts are often used purely for business-getting purposes and we submit that this is one of the clearest of those cases.

It is most emphatically not true as stated in the first line of Appellants' Reply Brief that the only substantial question involved in this appeal is—has the lower court correctly interpreted and properly applied the decision of this court (290 Fed. 54) in the previous case?

There are several other very vital issues not involving the correctness of the trial court's said interpretation, which cannot be ignored without disregarding settled law relating to appeals in preliminary injunction matters.

It is true that the court below in interpreting the decision was most positive in its finding of non-infringement, even without the further and more certain evidence which could be presented in an orderly trial. It is not true that *all* the evidence is before the court that can be and will be before the court on the issue of infringement on any regular trial of this case. Any decision this court may make will be based upon *ex-parte* affidavits, and one of the most important of those affidavits is that of plaintiffs' expert, Hackstaff, four-sixths of whose testimony is admitted by plaintiff to be incorrect by the withdrawal of the charge of infringement as to four of the traps origi-

nally relied upon. We have had no opportunity to cross-examine Mr. Hackstaff, and cross-examination might compel admissions which might make obviously untenable his position as to infringement as to the only two traps before the court, and thus conclusively prove non-infringement by the admission of plaintiff's own expert.

There is no ground for any assumption that *all* the evidence is before the court on this issue of infringement. On the contrary on the trial we have a right to produce and will produce other evidence to explode any new theory of infringement that may have been developed in the present argument. For instance, evidence of utility is often of the greatest importance on questions of infringement. (Walker on Patents, Sixth Edition, Section 432.) If this case should go to trial upon mere affirmance, without passing upon the issue of infringement presented in the present case, we are prepared to prove conclusively that there is no real utility in plugging the holes in Bray's cones in the alleged Trumble invention. *The very fact that defendant's Model 16 trap upon which the oil fell in a solid stream on a screen was contended to embody the Trumble invention and was shown to be more efficient than Trumble* demonstrates want of utility of a solid cone over a screen with 57 holes in it. Incidentally also it admits that the Trumble patent is anticipated by such devices as that of Bray, because it makes immaterial any difference between Trumble and Bray.

Counsel in the middle of page 5 of Plaintiff's Reply Brief refers to a *step by step encroachment* upon the Trumble patent. There is no evidence of any such "step

by step encroachment"—it is purely an assumption unsupported *by even an explanation of what particular traps are found in this alleged step by step infringement.*

The alleged closer and closer approximation of the Trumble invention is again referred to at the top of page 6 of Appellants' Reply Brief without any evidence whatsoever of any such progressive imitation. As a matter of fact the alleged infringement and that of Trumble are in form and effect as different as they can possibly be.

Most certainly the parties are not in accord as set forth in a statement in Appellants' Reply Brief at page 7, that no other subsequent testimony is available on the issue of infringement. We heretofore pointed out that we have a right to introduce any number of patents, prior uses, or publications, to show the state of the art on the trial, none of which are before the court at this time. We have a right in view of the wide discretion of the trial court, even if there was any possible doubt as to defendant's non-infringement in the present case, to have an opportunity by an orderly trial to present such evidence.

We have fully in appellants' brief anticipated any theory of *res adjudicata* against this defendant.

At the bottom of page 10 said Reply Brief counsel admit that it is impossible to know what is the construction of the inside of the trap without partially dismantling and crawling inside of the trap. This being so and all these traps being alike in appearance, how can plaintiff possibly be irreparably injured by their sale, when there is no notice or knowledge in or by the purchaser of the use of any such alleged invention within them?

At page 11 Appellant's Reply Brief, counsel to the absurdity of contending that the decree in the former suit is *res adjudicata* against this defendant, but that plaintiff may file an original bill presenting all the usual issues of validity in a patent suit, the defendant being ordered by subpoena to answer such bill, but that *upon raising the issue as required by the subpoena* evidence may not be considered. The contention is too absurd for an answer.

It is not true that defendant Lorraine Corporation participated in any manner in prior litigation as suggested on page 14 of Appellants' Reply Brief. The litigation was pending three years yet no attempt was made to join this defendant. It is clearly not bound by any such decree. The filing of a new suit raising the usual issues is in itself an admission of this fact. A most inexcusable and vitally misleading statement is found at the bottom of page 17 of Appellant's Reply Brief to the effect that defendant had evidence to prove that more than one trap like Towner No. 3 had been made. This is a brazen assertion by counsel unsupported by any evidence in the record. The accounting proceedings languished long, yet no such proof was ever suggested. Mr. Lorraine's testimony stands uncontroverted of record that there was only one such trap.

At page 19 of Appellant's Reply Brief counsel refer to Exhibit A 5 and A 6 and assume that the inside spirally arranged covered trough is "an expansion chamber." It is not an expansion chamber but merely an oil inlet pipe extended to the interior of the trap. There is obviously nothing in the Trumble device having any function or

effect at all analogous to this covered trough. It cannot be an expansion chamber because there is no gas discharge outlet in it. All the oil and gas must leave at the discharge outlet before any effective separation takes place. This is not true in the Trumble device as all the oil and gas is immediately discharged into a chamber where separation takes place.

Respectfully submitted,

WESTALL AND WALLACE,
By Joseph F. Westall.
Attorneys for Appellee.

No. 6077

United States

Circuit Court of Appeals

For the Ninth Circuit.

THOMAS DAY COMPANY, a Corporation, and WHITMAN SYMMES,

Appellants,

vs.

CLAUDE R. KING, Receiver of THOMAS DAY COMPANY, ROBERTS MANUFACTURING COMPANY, a Corporation, and GILL VIRDEN COMPANY, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

THOMAS, BEEDY, PRESLEY & PARAMORE, Esqrs., 315 Montgomery Street, San Francisco, California, Attorneys for Thomas Day Company,

STERLING CARR, Esq., 310 Sansome Street, San Francisco, California, Attorney for Whitman Symmes,

Attorneys for Appellants.

KNIGHT, BOLAND & CHRISTIN, Esqrs., 351 California Street, San Francisco, California, Attorneys for Claude R. King, Receiver of Thomas Day Company,

THEODORE J. SAVAGE, Esq., Humboldt Bank Bldg., San Francisco, California, Attorney for Roberts Manufacturing Co.,

ARTHUR DUNN, Jr., Esq., 810 Balfour Building, San Francisco, California, Attorney for Gill Virden Company,

Attorneys for Appellees.

In the Southern Division of the United States District Court, for the Northern District of California.

2244–S.

GILL VIRDEN COMPANY, a Corporation,
Complainant,

vs.

THOMAS DAY COMPANY, a Corporation,
Defendant.

BILL IN EQUITY FOR RECEIVER.

Complainant, a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Philadelphia, Pennsylvania, brings this bill of complaint on its behalf and on behalf of all other creditors of Thomas Day Company, a corporation, who shall gain herein, against the said Thomas Day Company, a corporation organized and existing under and by virtue of the laws of the State of California, and respectfully shows as follows:

I.

That complainant is now and at all times herein mentioned was a citizen and resident of the State of Pennsylvania, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, organized for the purpose of doing a general manufacturing business and for the sale of articles necessary for the manufacture of lighting fixtures, with its principal place of business at

Philadelphia, Pennsylvania. That the defendant, Thomas Day Company, is a corporation organized and existing under the laws, and a citizen and resident of, the State of California, and doing and transacting business as such in the Southern Division of the Northern District thereof.

II.

That within four years last past, defendant became indebted to complainant [1*] herein for goods, wares and merchandise in the sum of $3,217.29, and that defendant agreed to pay said sum for said goods, wares and merchandise, and said sum is the reasonable value thereof. No part of said sum has been paid, and complainant is informed and believes, and upon such information and belief alleges that said sum has not been paid for the reasons hereinafter set forth.

III.

Defendant was incorporated for the purpose of engaging in, and ever since the date of its corporation it has engaged in, the business of manufacturing, handling and selling lighting fixtures and materials pertaining thereto, and has enjoyed a business not only in the City and County of San Francisco, but on the entire Pacific Coast, and by reason of being in business for many years last past, has built up a large and profitable business, so that at normal and reasonable times its net profit has been and should be about $40,000 per annum.

*Page-number appearing at the foot of page of original certified Transcript of Record.

In the course of its business as aforesaid, defendant has accumulated total assets of the reasonable value of about $450,000, consisting of real estate, plant, equipment, bills receivable, manufacturing fixtures on hand, stock on hand and notes receivable. Said real estate, plant, equipment, bills receivable and stock on hand have a largely enhanced value as a part of a going concern, all of which would be lost if any of the same should be disposed of separately.

IV.

During the last few years, defendant has manufactured an overproduction of lighting fixtures and accumulated a very large amount of stock on hand and permitted many accounts receivable to accrue. By reason thereof, defendant is not at this time able to meet its pressing obligations, but it has [2] assets far in excess of its liabilities.

In the conduct of its business as aforesaid, defendant has incurred indebtedness and liabilities substantially as follows: to banks and note holders, approximately $35,000; to trade creditors, approximately $100,000. Defendant is unable to pay the aforesaid obligations or any part of them as they mature, and is unable to carry on its business as it is unable to meet its weekly payrolls.

Complainant is informed and believes, and upon such information and belief alleges that certain of said creditors of defendant threaten to and will commence actions for the purpose of recovering the amounts due them, respectively, as aforesaid, and in connection therewith will attach and garnish the

property of defendant and thereafter sell the same under judicial and legal process. The result of such conduct of behalf of creditors will be that various items of property and assets will be sold for much less than their actual value, and in addition thereto, the value of defendant as a going concern will be destroyed—the result of which will be that defendant will become and be insolvent and there will be insufficient property and assets to pay the claims and obligations owned by defendant as aforesaid, and complainant and other creditors will lose substantial amounts of their claims.

Complainant is advised and believes, and therefore alleges that if a Receiver is appointed, necessary money can be obtained for the conducting of said business, and that advantage can be taken of uncompleted contracts of the defendant which are now in course of performance, and the profits accruing therefrom can be converted for the use and benefit of complainant and other creditors of the defendant. The property of defendant could be sold as a whole and a going concern for a much larger sum than if sold in smaller parcels under judicial [3] process.

That it is to the best interests of the complainant and to other creditors of the defendant that a Receiver be appointed by this Court for the properties of the defendant, with directions to take possession, custody and control of all the properties and assets of the defendant and to operate the business of the defendant and, if possible, pay the claims of complainant and other creditors of the defendant, and

if not possible, under the jurisdiction and order of this Court to sell said property as a whole for the like use and benefit of complainant and other creditors of the defendant, and that the said Receiver be privileged to approve or disapprove any existing contracts of the defendant.

INASMUCH AS, THEREFORE, complainant has no adequate remedy at law and can have relief only in equity, complainant files this bill on behalf of itself and any and all other creditors who may come in and contribute to the expenses hereof, and prays for equitable relief as follows:

I.

That the rights of complainant and all of the other creditors of defendant may be ascertained and declared, and that the Court will fully administer the property, business and assets of defendant, and will, for such purpose, marshall the assets of defendant and ascertain the rights, liens and priorities of the persons interested therein.

II.

For the purpose of preserving the business, property and assets of defendant and operating and conducting the same as a unit and to preserve its integrity as a going concern, a Receiver be appointed to take possession of and hold the property, business and assets of defendant; that said Receiver [4] be authorized and directed to operate, manage and control the said business and assets in such manner as in his judgment will produce most satisfactory

results, so that the same may be continued in operation as a business unit, and to that end be authorized and directed to approve or disapprove the various contracts of defendant, and to execute and perform all contracts approved, and to the end aforesaid, and in the discretion of said Receiver, said Receiver be authorized to employ and discharge all the officers, managers, attorneys, agents and employees and to fix and pay compensation thereof, and to otherwise make such payments and disbursements as may be needful and proper in the conduct and operation of said business, and also to use and to collect and receive all moneys and profits from the operation and conduct thereof; that said Receiver be further authorized and directed to maintain and defend*ant* any and all suits at law and in equity necessary for the purposes aforesaid; and that it be further ordered that all persons, firms and corporations having possession and/or control of the business, property or assets of defendant shall deliver the same to said Receiver, and that his proper receipt therefor shall be full acquittance thereof, and that it be further ordered and decreed that all directors, officers, attorneys, servants and employees of defendant shall obey all of the orders and directions of said Receiver, and that all persons, firms and corporations be enjoined and restrained from interfering in any manner or form whatever with the property, business and assets of defendant, or with the orders and directions of said Receiver; and that said Receiver shall provide a bond in such sum and with such surety as may be approved by this Court,

conditioned that he will well and duly perform the duties of his office and duly account for [5] all moneys and property which may come into his hands, and abide by and perform any and all things which he may be directed to do.

III.

That a writ of subpoena be granted complainant, directed to defendant, requiring the defendant to appear herein upon a day certain and make full and perfect answer in the premises.

Lastly, for such other and further relief as the Court may deem meet and proper and equitable in the premises.

ARTHUR DUNN, Jr.,
Solicitor for Complainant.

State of California,
City and County of San Francisco,—ss.

Arthur Dunn, Jr., being first duly sworn, says: That he is the attorney for the Gill Virden Company, a Pennsylvania corporation, the complainant in the above-entitled action; that no officer of said complainant corporation is within the State of California, and for that reason affiant makes this affidavit and verification in its behalf.

That he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to such matters, that he believes it to be true.

ARTHUR DUNN, Jr.

Subscribed and sworn to before me this 1st day of December, 1928.

[Seal] CHALMER MUNDAY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 3, 1928. [6]

[Title of Court and Cause.]

ANSWER OF DEFENDANT.

Comes now Thomas Day Company, a corporation, defendant herein, and answers the complaint of complainant herein as follows:

I.

The defendant admits all the allegations of said bill of complaint as true.

II.

The defendant joins in the prayer of said bill of complaint, and prays that this Court, sitting in Equity, may take possession of the property, business and assets of defendant through the appointment of a Receiver as prayed in said complaint, and thereby conserve the business of the defendant in unity, and conserve the assets thereof and prevent the same from being sacrificed and lost under any legal or other proceedings which can or may be taken, and to that end, that this Honorable Court authorize such Receiver to take possession of said

business and assets of said defendant to conserve the same, and particularly to manage, operate and conduct the business and assets of defendant, pay any and all indebtedness or to become due by defendant, and otherwise discharge the duties imposed by Courts upon Receivers in similar cases, and that the proceeds arising from the sale of said property, or any part [7] thereof, if any, shall be applied under the orders and decrees of this Court according to the rights, interest and equity of the parties herein interested, and that this Court will direct any persons in possession of any of the property of defendant to surrender the same to such Receiver.

JOHN E. MANDERS,
Solicitor for Defendant.

State of California,
City and County of San Francisco,—ss.

Whitman Symmes, being first duly sworn, says: That he is the President of the Thomas Day Company, a corporation, defendant in the above-entitled matter, and as such officer makes this verification in its behalf.

That he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters, that he believes it to be true.

WHITMAN SYMMES.

Subscribed and sworn to before me this 1st day of December, 1928.

[Seal] CHALMER MUNDAY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 3, 1928. [8]

(Title of Court and Cause.)

ORDER APPOINTING RECEIVER.

Complainant above named having filed herein its bill of complaint, praying among other things, for the appointment of a Receiver herein, and the defendant having answered thereto,—

NOW, THEREFORE, upon motion of Arthur Dunn, Jr., solicitor for complainant, and having heard John E. Manders, solicitor for the defendant, and after due consideration thereof,—

IT IS ORDERED, ADJUDGED AND DECREED THAT CHARLES F. DUVAL be, and he is hereby, appointed Receiver of defendant Thomas Day, a corporation, and of all the property and assets of said defendant; that said Receiver be, and he is hereby, authorized and directed to immediately take possession of the said business and assets of said corporation, and is further authorized and directed to operate, manage and control the said business and assets in such manner as in his judgment will produce most satisfactory results, so that the same may be continued in operation as a busi-

ness unit, and to that end is authorized and directed to approve or disapprove, in his discretion, the various contracts of defendant, and to execute and perform all contracts approved, and to the end aforesaid, and in the discretion of said Receiver, said Receiver is authorized to employ and discharge all of the officers, managers, attorneys, agents and employees and to fix and pay the compensation thereof, and to otherwise make such payments and disbursements as may be needful and proper in the conduct and operation of said business, and also to use and to collect and receive all moneys and profits from the operation and conduct thereof. Said Receiver is further authorized and directed to [9] maintain and defend any and all suits at law and in equity necessary for the purposes aforesaid.

IT IS FURTHER ORDERED that all persons, firms and corporations having possession and/or control of the business, property or assets of defendant shall deliver the same to said Receiver, and his proper receipt therefor shall be full acquittance thereof, and it is further ordered and decreed that all directors, officers, attorneys, servants and employees of defendant shall obey all of the orders and directions of said Receiver, and that all persons, firms and corporations are enjoined and restrained from interfering in any manner or form whatever with the property, business and assets of defendant, and with the orders and directions of said Receiver.

IT IS FURTHER ORDERED that said Receiver shall provide a bond in the sum of $20,000.00 with

sufficient surety to be approved by the Judge of this court, conditioned that he will well and duly perform the duties of his office and duly account for all moneys and property which may come into his hands, and abide by and perform any and all things which he may be directed to do.

Dated: December 3, 1928.

A. F. ST. SURE,
Judge of the U. S. District Court.

[Endorsed]: Filed Dec. 3d, 1928. [10]

(Title of Court and Cause.)

SUBSTITUTION OF ATTORNEYS.

To Plaintiff Above Named and to Its Attorney, Arthur Dunn, Jr.:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that defendant above named has changed its attorneys in the above-entitled action and that Messrs. Thomas, Beedy, Presley & Paramore, Room 1119 California Commercial Union Building, 315 Montgomery Street, San Francisco, California, have been and they are substituted in the place of John E. Manders as attorney for defendant herein, and the undersigned hereby consent to said change of attorneys:

Dated: May 24, 1929.

[Seal] THOMAS DAY COMPANY.
By WHITMAN SYMMES, Pres.,
Defendant.
JOHN E. MANDERS,
Attorney for Defendant.

We, the undersigned, hereby accept the above substitution of ourselves as attorneys for the defendant in the above-entitled action in the place and stead of John E. Manders.

Dated: May 24, 1929.

THOMAS, BEEDY, PRESLEY & PARAMORE,
Attorneys for Defendant.

Due service and receipt of a copy of the within substitution is hereby admitted this 24th day of May, 1929.

CHARLES A. CHRISTIN,
KNIGHT, BOLAND & CHRISTIN,
Attorneys for Receiver.
ARTHUR DUNN, Jr.,
Attorney for Complainant.

[Endorsed]: Filed May 27, 1929. [11]

(Title of Court and Cause.)

PETITION FOR APPOINTMENT OF TEMPORARY RECEIVER.

To the Honorable A. F. ST. SURE, Judge of the United States District Court:

The petition of Charles A. Christin respectfully shows:

That he is the attorney for the Receiver of the Thomas Day Company, and has been since the inception of said receivership; that Charles F. Duval was the duly appointed, qualified and acting Receiver of said Company, appointed by this Court in the above-entitled matter.

That said Charles F. Duval was killed in an automobile accident on September 10, 1929.

That the affairs of said receivership, and the conduct thereof requires the immediate appointment of a temporary Receiver to carry on the business thereof until such time as its affairs may be straightened out and arrangements made for future conduct of the receivership.

That Claude R. King is now and for a long time prior hereto has been in charge of all the books and records of said company and said receivership, and is the person most familiar with all matters pertaining to said receivership, and is in all other respects fully qualified to act as a temporary Receiver of said company during the period of readjustment.

WHEREFORE, petitioner prays that this Honorable Court give and make its order appointing Claude R. King as the Temporary Receiver of the Thomas Day Company, a corporation, upon his posting bond in the sum of $20,000.00 and taking the oath as required by law, and that he be authorized to act as Receiver of said Company until a successor

be appointed—and for such other order as to the Court may seem meet in the premises.

CHARLES A. CHRISTIN.

CHARLES A. CHRISTIN,
KNIGHT, BOLAND & CHRISTIN,
Attorneys for Receiver. [12]

State of California,
City and County of San Francisco,—ss.

Charles A. Christin, being first duly sworn, says: That he is the attorney for the Receiver in the above-entitled matter, and is the petitioner in the foregoing petition named; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters, that he believes it to be true.

CHARLES A. CHRISTIN.

Subscribed and sworn to before me this 11th day of September, 1929.

[Seal] LULU P. LOVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sept. 11, 1929. [13]

(Title of Court and Cause.)

ORDER APPOINTING TEMPORARY RECEIVER.

Upon reading the verified petition of Charles A. Christin, and good cause appearing therefor—

IT IS HEREBY ORDERED that Claude R. King be, and he is hereby, appointed temporary Receiver of defendant Thomas Day Company, a corporation, and of all the property and assets of said corporation, in the place and stead of Charles F. Duval, the duly appointed, qualified and heretofore acting Receiver of said company who was killed September 10, 1929.

IT IS FURTHER ORDERED that said Claude R. King shall be vested with all the authority, powers and discretions of the Receiver as set forth in the order on file in the above-entitled action made and entered on December 3, 1928, appointing a Receiver in this matter.

IT IS FURTHER ORDERED that the temporary Receiver shall provide a bond in the sum of $20,000.00, with sufficient surety to be approved by this Court, conditioned that he will well and duly perform the duties of his office and duly account for all moneys and property which may come into his hands, and abide by and perform any and all things which he may be by this Court directed to do.

IT IS FURTHER ORDERED that Charles A. Christin be, and he is hereby, appointed as attorney for said Receiver.

Dated: September 11, 1929.

HAROLD LOUDERBACK,
Judge of the U. S. District Court.

[Endorsed]: Filed Sept. 11, 1929. [14]

(Title of Court and Cause.)

AMENDED PETITION FOR APPOINTMENT OF TEMPORARY RECEIVER.

To the Honorable A. F. ST. SURE, Judge of the United States District Court:

The amended petition of Charles A. Christin respectfully shows:

That he is the attorney for the Receiver of the Thomas Day Company, and has been such since the inception of said receivership; that Charles F. Duval was the duly appointed, qualified and acting Receiver of said Company, appointed by this Court in the above-entitled matter; that said Charles F. Duval was killed in an automobile accident on September 10, 1929.

That the affairs of said receivership and the conduct thereof require the immediate appointment of a temporary Receiver to carry on the business thereof until such time as its business may be straightened out and arrangements made for the future conduct of the receivership.

That immediately upon being advised of the death of Mr. Duval, your petitioner called a meeting of the Creditors' Committee; this committee was ap-

pointed at the inception of the receivership to advise in all matters of business, and it meets with the Receiver to discuss and determine all matters of policy and business procedure. This meeting was called for 11:30 on the morning of September 11, 1929, and was attended by the following:

Charles A. Christin, attorney for Receiver; J. B. Robinson, representing the Bank of Italy, a creditor;

S. B. Rocchietti, representing Westinghouse Lamp Co., a creditor;

Whitman Symmes, president of Thomas Day Company, a creditor;

Sterling Carr, attorney for Whitman Symmes;

James Paramore, representing the stockholders of the Day Company;

Anson S. Blake, a creditor and assignee of Whitman Symmes;

B. Singer, representing the Board of Trade of San Francisco;

H. L. Clark, representing the American Brass & Bronze Co.;

C. D. Cunningham, representing the National Mortgage Company. [15]

The only member of the committee not there present was Mr. Baum, the local representative of Gill Virden Company, and he could not be located on the short notice necessitated.

The matter of the appointment of a temporary Receiver was fully discussed and debated, and it was the unanimous opinion of those present that Claude R. King was the man most fitted to fill the

position of Receiver at this time; Claude R. King is now and for a long time prior hereto has been in charge of all the books and records of said company and said receivership, and is the person most familiar with all matters pertaining to said receivership, and is in all other respects fully qualified to act as a temporary Receiver of said company during the period of readjustment, and has consented to so act.

WHEREFORE, petitioner prays that this Honorable Court give and make its order appointing Claude R. King as the temporary Receiver of the Thomas Day Company, a corporation, with like powers of the general Receiver, upon his posting bond in the sum of $20,000, and taking the oath as required by law; and that he be authorized to act as Receiver of said company until a successor be appointed—and for such other order as to the Court may seem meet in the premises.

CHARLES A. CHRISTIN,
Petition.

CHARLES A. CHRISTIN,
KNIGHT, BOLAND & CHRISTIN,
Attorneys for Receiver.

State of California,
City and County of San Francisco,—ss.

Charles A. Christin, being first duly sworn, says: That he is the petitioner in the above-entitled matter named; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except [16] as to

matters therein stated on information and belief, and that as to such matters, he believes it to be true.

CHARLES A. CHRISTIN.

Subscribed and sworn to before me this 20th day of September, 1929.

[Seal] MARION CURTIS,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sept. 20, 1929. [17]

(Title of Court and Cause.)

ORDER APPOINTING TEMPORARY RECEIVER.

Upon reading the verified, amended petition of Charles A. Christin for the appointment of a temporary Receiver in the above-entitled matter, and good cause appearing therefor—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Claude R. King be, and he is hereby appointed temporary Receiver of defendant Thomas Day Company, a corporation, and of all the property and assets of said corporation, in the place and stead of Charles F. Duval, the duly appointed, qualified and heretofore acting Receiver of said Company, who was killed September 10, 1929.

IT IS FURTHER ORDERED that said Claude R. King shall be and he is hereby vested with all the authority, powers and discretions of the Re-

ceiver as set forth in the order on file in the above-entitled action, made and entered on December 3, 1928, appointing a Receiver in this matter.

IT IS FURTHER ORDERED that the temporary Receiver shall provide a bond in the sum of $20,000, with sufficient surety to be approved by this Court, conditioned that he will well and duly perform the duties of his office and duly account for all moneys and properties which may come into his hands, and abide by and perform any and all things which he may be by this Court directed to do.

IT IS FURTHER ORDERED that Charles A. Christin be, and he is hereby appointed as Attorney for said temporary Receiver.

IT IS FURTHER ORDERED that this order upon the amended petition of Charles A. Christin, confirms the order heretofore made herein on September 11, 1929, appointing said Claude R. King as temporary Receiver, and his power to act [18] thereunder is hereby ratified and confirmed.

Done in open court this 19th day of September, 1929.

A. F. ST. SURE,
Judge of the U. S. District Court.

[Endorsed]: Filed Sept. 20, 1929. [19]

(Title of Court and Cause.)

PETITION FOR CONFIRMATION OF SALE, OR FOR THE ADOPTION OF A REORGANIZATION PLAN, OR FOR THE CONTINUATION OF THE PRESENT RECEIVERSHIP.

To Honorable A. F. ST. SURE, Judge of the United States District Court:

The petition of Claude R. King respectfully shows:

That he is now the duly appointed, qualified and acting temporary Receiver of Thomas Day Company, a corporation, succeeding Charles F. Duval, its Receiver; that said receivership has been conducted since December of 1928, and endeavors have been continuously made by your petitioner and his predecessor to secure an advantageous sale of the business or a workable reorganization thereof which will redound to the benefit of creditors and all interested in the receivership.

That the untimely death of Charles F. Duval has precipitated the desire of your petitioner and its Creditors' Committee to have some definite decision in the matter. There has been submitted to your petitioner two firm offers of purchase, as follows:

1. Maxwell Hardware Company, a corporation, has given your Receiver a certified check for $5,000, with a bid, in body as follows:

"We hereby make a flat bid for the following assets of the Thos. Day Company now in your hands. Thos. Day Company at 725 Mission St., San Francisco, California; also in Barker Bros. Building, Los Angeles, California, and in Salt Lake City, Utah. All the merchandise at the above-mentioned places; all the machinery, equipment and all patterns used in the manufacture of lighting fixtures, for the total sum of $50,000.00. A certified check of 10% of the above, viz.: $5,000.00, herewith.

"This bid is intended to cover all merchandise and [20] manufacturing implements wherever located in California, also name and good will of Thomas Day Co."

2. Roberts Manufacturing Company, a corporation, has given your Receiver a certified check for $6,000, with a bid, in body as follows:

"We offer to purchase for the cash sum of $60,000 (Sixty Thousand Dollars), all the merchandise contained in the four story and basement building known as 725 Mission Street (through to Minna Street) San Francisco, California, also, all the machinery and equipment of factory and offices, together with all furniture and fixtures, patterns, chucks, dies, patents, catalogues, drawings and details. Our bid also covers all the merchandise and samples and drawings contained in the Barker Bros. Building, Los Angeles, California, the property of Thos. Day Company, also, any merchandise in warehouses or any other offices owned by Thos.

Day Company. This bid also covers name and good will of Thos. Day Company.

"Our bid is based on an examination and physical count of merchandise as of September 3, 1929. An adjustment to be made as of that date as to receipts and deliveries of merchandise.

"Our certified check for the sum of $6,000 (Six Thousand Dollars) being 10% of the amount of this bid, is enclosed." A supplement to this bid is as follows:

"In connection with our bid dated September 18th, 1929, we offer to finish and install all partly completed lighting fixture contracts for actual cost of labor and material and overhead, any profit to go to the creditors of Thos. Day Company. If there is a loss we would be reimbursed by the Receiver."

Certain of the employees of Thomas Day Company have heretofore submitted to your Receiver's predecessor their plan as follows: [21]

"Employees form a corporation which will agree as follows:

"Corporation agrees to take selling end of business and pay one-half of Bookkeeping and Cost Dept. and all of electric lights, phones, etc., attached to show rooms, and $500.00 per month service charge.

"Receiver agrees to give new corporation preference on anything in inventory excepting current purchases, purchases in transit, or regular commercial units purchased during receivership, at 50¢ on $1.00 of cost.

"Receiver will continue to operate factory until he has completed all work now in process or contracted for and during his operation of factory, he will manufacture for new corporation such orders as they may take, new corporation to pay cost plus 10% for such work. When he has completed all his contracts he will turn over factory to them so that it may be operated by them and in lieu of rental for the use thereof, they shall place one-third of stock of new corporation in escrow, with escrow provision that all profits earned thereon shall be paid over quarterly to Receiver, for the creditors until such time as creditors claim are fully satisfied.

"During the life of this agreement, the new corporation will endeavor to use up as rapidly as possible all the merchandise remaining in the inventory for which they will pay 50¢ on the $1.00 of cost, either factory cost or landed cost.

"Receiver is to have full access to all books and records of new corporation.

"All question of policy of operating shall be submitted to Receiver for approval so that creditors interests cannot be jeopardized.

"Either party has right to cancel the agreement by giving 10 days notice. [22]

"In event that this contract is carried to a successful conclusion and creditors are satisfied, the Receiver agrees to transfer all right, title and interest in factory, equipment and merchandise and remaining assets to new corporation in consideration of the said one-third earnings or as a bonus for

their sales services during the period of the contract with the understanding that this meets with the approval and sanction of the old Thomas Day Company.

"All factory charges are to be paid to the Receiver as the respective amounts are collected from the customer by the new corporation.

"The Sales Agreement begins on the morning of Monday, June 17th, 1929."

Immediately following the receipt of the two bids above set forth, and the renewal by the employee of Thomas Day Company of their plan to carry on the business, your Receiver called a meeting of his Creditors' Committee which met with him at 3:30 o'clock on Friday, September 20, 1929, to discuss the alternatives and arrive at some decision. At said meeting there were present:

Your Receiver, Claude R. King, and Charles A. Christin, his attorney; J. B. Robinson, of Bank of Italy, a creditor; Brooke Mohun, of Sierra Financial Corporation, a creditor; Anson S. Blake, a creditor and assignee of Whitman Symmes; Sterling Carr, attorney for Whitman Symmes, a creditor; S. B. Rocchietti, of Westinghouse Lamp Co., a creditor; H. L. Clark, of American Brass & Bronze Co., a creditor. There was not there present Mr. Baum of Gill Virden Company, a member of said committee, nor anyone representing the Board of Trade of San Francisco, the remaining member of said committee. [23]

After a great deal of discussion, it was determined unanimously by that committee that your

Receiver should make return to this Court of the two firm offers received, together with the employees' plan, and at a hearing before this Court after notice to all interested parties and creditors, ask this Honorable Court for confirmation of sale to the highest bidder for cash, or for the sanction of the employees' plan or continuation of the receivership at present.

Your Receiver and his Creditors' Committee have been unable to arrive at a definite decision as to which bid or plan should be accepted and are unanimously of the opinion that an opportunity be given before this Honorable Court for a determination of what is best for the receivership and those interested therein. Your Receiver therefore returns to this Honorable Court for confirmation or rejection the two bids and the employees' plan heretofore submitted to him. Your Receiver has this day sent to all creditors and interested parties a notice of the hearing of this petition, and a request for higher bids or better plans to be submitted to him prior to the hearing, or presented in open court at the hearing.

WHEREFORE, your Receiver prays:

1. That this Honorable Court consider the bids and the plan here presented, together with any additional bids or plans offered prior to or at the hearing;

2. That after due consideration and hearing, this Honorable Court give and make its order confirming a sale of the assets of said receivership to the

highest bidder therefor; or approving the best plan offered;

3. That if this Court determine that no bid or plan offered is for the best interests of said receivership and those interested therein, that all bids and plans be rejected [24] and this Honorable Court make such other, further or different order as may be meet in the premises.

CLAUDE R. KING,
Temporary Receiver, Petitioner.

CHARLES A. CHRISTIN,
KNIGHT, BOLAND & CHRISTIN,
Attorneys for Receiver.

State of California,
City and County of San Francisco,—ss.

Claude R. King, being first duly sworn, says: That he is the temporary Receiver of Thomas Day Company, and as such is the petitioner in the above-entitled matter; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters, that he believes it to be true.

CLAUDE R. KING.

Subscribed and sworn to before me this 23d day of September, 1929.

[Seal] MARION CURTIS,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sept. 23, 1929. [25]

(Title of Court and Cause.)

AFFIDAVIT OF PUBLICATION IN "THE RECORDER" OF NOTICE OF SALE OF ASSETS AT COURT SALE.

NOTICE OF SALE OF ASSETS AT COURT SALE.

In the Southern Division of the United States District Court, for the Northern District of California.

GILL VIRDEN COMPANY, a Corporation,
Complainant,

vs.

THOMAS DAY COMPANY, a Corporation,
Defendant.

NOTICE OF SALE OF ASSETS AT COURT SALE.

Notice is hereby given that the undersigned, Claude R. King, receiver of the Thomas Day Company, a corporation, will sell, Tuesday, the 12th day of November, 1929, in open court, at ten o'clock A. M. of said day, at the courtroom of the above-entitled court, before Honorable A. F. St. Sure, Post Office Building, Seventh and Mission Streets, San Francisco, California, for cash, to the highest bidder therefor, the following:

All the assets of every character and description belonging to or used in the business of Thomas Day Company, except accounts receivable; all goods, wares and merchandise of every kind and character contained in the four-story and basement building known as 725 Mission Street, San Francisco, California, and in the place of business of Thomas Day Company in the Barker Brothers Building, Los Angeles, or in warehouses or other places; all furniture, fittings, furnishings and fixtures of every kind and description contained in the offices or other places of business of Thomas Day Company; all machinery, tools, equipment, appliances, and other personal property contained in or used in said company's factory; all patents, patent rights, chucks, dies, patterns, catalogs, drawings, details and all appliances and equipment of the designing department of said business, together with all samples and all automobiles or delivery vehicles; the business and the good will of the business of Thomas Day Company; the right of the purchaser to hold itself out as the successor of Thomas Day Company and as having acquired the good will thereof.

The terms and conditions of sale are cash, lawful money of the United States, 10 per cent at the time of sale and the balance upon confirmation by the above-entitled Court.

All of the above-mentioned property will be delivered to the purchaser upon confirmation, save and except that the Receiver of the Thomas Day Company reserves to himself all work in process

and the exclusive use of the factory and equipment therein and therefor for the period of ninety days after said confirmation.

Dated October 31, 1929.

CLAUDE R. KING,
Federal Receiver of Thomas Day Company.
CHARLES A. CHRISTIN,
KNIGHT, BOLAND & CHRISTIN,
Balfour Building, San Francisco, California,
Attorneys for Receiver.

Oct. 31 to Nov. 12, inclusive—dly.

Published in "The Recorder," 337 Bush Street, San Francisco, California. Phone Sutter 1190.

AFFIDAVIT OF PUBLICATION.

State of California,
City and County of San Francisco,—ss.

E. C. Luchessa, being first duly sworn, deposes and says: [26]

That he is and at all times hereinafter mentioned was a citizen of the United States, over the age of twenty-one years and a resident of said city and county; and is and was at and during all said times, the principal clerk of The Recorder Printing and Publishing Company, printers and publishers of "The Recorder," a newspaper of general circulation printed and published daily (Sundays and legal holidays excepted) in the city and county of San Francisco, State of California; that said "The

Recorder'' is and was at all times herein mentioned, a newspaper of general circulation, as that term is defined by Section 4460 of the Political Code; its status as such newspaper of general circulation having been established, pursuant to Section 4462, Political Code, by a decree of the Superior Court of the City and County of San Francisco, Department No. 11 thereof, Hon. William P. Lawlor, Judge, made and entered on the 11th day of October, 1905, which said decree was restored by a judgment given in the Superior Court of the City and County of San Francisco, Department No. 11 thereof, Hon. William P. Lawlor, Judge, made and entered on the 2d day of December, 1907, and recorded in Record Book 15, at page 155 thereof; and as provided by said Section 4460, is and at all said times was published for the dissemination of local and telegraphic news and intelligence of a general character, having a *bona fide* subscription list of paying subscribers, and is not and never was devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling, race or denomination, or for the entertainment and instruction of any number of such classes, professions, trades, callings, races or denominations; that at all said times said newspaper had been established, printed and published in said city and county of San Francisco, State of California, at regular [27] intervals for more than one year preceding the first publication of this notice herein mentioned; that said notice was set in type not smaller than nonpareil and was pre-

ceded with words printed in black-face type not smaller than nonpareil, describing and expressing in general terms the purport and character of the notice intended to be given; that a Notice of Sale of Assets at Court Sale in the above-entitled matter, of which the annexed is a true printed copy, was published in said newspaper on the following dates, to wit: October 31, 1929; and November 1, 2, 4, 5, 6, 7, 8, 9 and 12, 1929; being as often as said newspaper was published during said period; and further deponent sayeth not.

E. C. LUCHESSA.

Subscribed and sworn to before me this 12th day of November, 1929.

[Seal] CHARLES R. HOLTON,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed November 14, 1929. [28]

[Title of Court and Cause.]

OPPOSITION TO PETITION OF RECEIVER TO SELL THE RIGHT OF THE PURCHASER TO HOLD ITSELF OUT AS THE SUCCESSOR OF THOMAS DAY COMPANY.

Now come Whitman Symmes, Mabel Symmes, Anson Blake and Anita D. S. Blake, and object to the sale by the Receiver of the right of the pur-

chaser to hold itself out as the successor of Thomas Day Company, all as set forth in the notice of sale of assets at court sale dated October 31, 1929, upon the following grounds, to wit:

1. That Whitman Symmes is the record owner of eighteen hundred and three (1803) shares of the capital stock of the said Thomas Day Company, all of which shares of capital stock are pledged to Mabel Symmes and Anita D. S. Blake to secure indebtedness due from the said Whitman Symmes to the said Mabel Symmes and the said Anita D. S. Blake.

2. That the said Thomas Day Company is indebted to Anson Blake in the sum of approximately forty-five thousand (45,000) dollars, made up of direct indebtedness of said corporation to the said Anson Blake in the sum of approximately ninety-seven hundred fifty (9750) dollars, and of indebtedness of said corporation to Whitman Symmes in the sum of approximately thirty-five [29] thousand two hundred and six (35,206) dollars, and which latter claim of the said Whitman Symmes against said corporation has heretofore been assigned to and is now held by the said Anson Blake.

3. That it is not for the best interests of said corporation defendant, or of its creditors or stockholders, that the property of said corporation be sold at this time; that it will be for the best interests of all of said parties if the said Receiver continues to operate said property until otherwise ordered by this Court.

4. That said parties above named, and each and all of them, hereby protest against the sale of the goodwill of said Thomas Day Company, and also against the giving or selling to said purchaser the right to hold itself out as the successor of Thomas Day Company, upon the following grounds, to wit:

(a) That said Receiver has no jurisdiction over said goodwill and/or said name "Thomas Day Company," and has no jurisdiction or right to give, sell or grant to said purchaser the right to hold itself out as the successor of Thomas Day Company;

(b) That the purchaser at such sale will not, in fact, be the successor of Thomas Day Company, by reason of the fact that neither the Receiver nor this Court has authority or jurisdiction to sell the name "Thomas Day Company," and that such right is not included within the receivership heretofore granted in the above-entitled matter;

(c) That the above-entitled court has no jurisdiction to order, direct or authorize said purchaser to hold itself out [30] as the successor of Thomas Day Company.

Dated: November 16th, 1929.

WHITMAN SYMMES,
STERLING CARR,
Attorneys for Whitman Symmes.

MABEL SYMMES,
ANSON BLAKE,
ANITA D. S. BLAKE,
By STERLING CARR,
Attorney for Mabel Symmes, Anson Blake and Anita D. S. Blake.

STERLING CARR,
Attorney for Mabel Symmes, Anson Blake and Anita D. S. Blake.

Rec'd copy of within this 18th day of November, 1929.

KNIGHT, BOLAND & CHRISTIN,
By C. A. CHRISTIN,
Attys. for Receiver.

[Endorsed]: Filed November 18, 1929. [31]

(Title of Court and Cause.)

OPPOSITION OF DEFENDANT TO PETITION OF RECEIVER TO SELL THE GOODWILL OF DEFENDANT AND THE RIGHT OF THE PURCHASER OF THE ASSETS TO HOLD ITSELF OUT AS THE SUCCESSOR OF THOMAS DAY COMPANY.

Now comes Thomas Day Company, a corporation, the defendant above named, and objects to the sale

by the Receiver of the goodwill of said defendant and the right of the purchaser of the assets of said defendant to hold itself out as the successor of Thomas Day Company, said defendant, all as set forth in the notice of sale of assets at court sale dated October 31, 1929, upon the following grounds, to wit:

1. That defendant Thomas Day Company is a corporation organized and existing under and by virtue of the laws of the State of California.

2. That the above-entitled court and said Receiver are without right, authority or jurisdiction to offer for sale, or to sell, the goodwill of said defendant and/or to authorize the purchaser of the assets of said defendant under said notice of sale dated October 31, 1929, to hold itself out as the successor of Thomas Day Company.

3. That it is not for the best interests of said corporation defendant, or of its creditors or stockholders, that the property [32] of said corporation be sold at this time; that it will be for the best interest of all of said parties if the said Receiver continues to operate said property until otherwise ordered by this Court.

4. That said Receiver has no jurisdiction over said goodwill and/or said name "Thomas Day Company," and has no jurisdiction or right to give, sell or grant to said purchaser the right to hold itself out as the successor of Thomas Day Company.

5. That the purchaser at such sale will not, in fact, be the successor of Thomas Day Company, by reason of the fact that neither the Receiver nor this

Court has authority or jurisdiction to sell the name "Thomas Day Company," and that such right is not included within the receivership heretofore granted in the above-entitled matter.

6. That the above-entitled court has no jurisdiction to order, direct or authorize said purchaser to hold itself out as the successor of Thomas Day Company.

Dated: November 25, 1929.

THOMAS DAY COMPANY,
By WHITMAN SYMMES,
President.

THOMAS, BEEDY, PRESLEY & PARAMORE,
GEORGE J. PRESLEY,
Attorneys for Said Defendant.

[Endorsed]: Filed Nov. 25, 1929. [33]

(Title of Court and Cause.)

RECEIVER'S RETURN OF SALE.

Claude R. King, Receiver of the Thomas Day Company, a corporation, hereby makes and fil*d*s this, his return of sale of the following described property, together with his petition for confirmation, and respectfully shows to this Honorable Court as follows:

That heretofore, under and pursuant to the power and authority vested in him as Receiver, your petitioner, as such Receiver, offered for sale the follow-

ing assets of the Thomas Day Co. and caused notice of the day on or after which the sale of the interest of said corporation in and to said personal property would be made, to be published in the San Francisco "Recorder," a newspaper of general circulation, printed and published in the City and County of San Francisco, for ten days successively next before said day on which said sale would be made, in which notice said assets, hereinafter described, were set forth, and the affidavit attached hereto, more fully shows the nature and duration of said publication.

That thereafter, to wit, on the 17th day of November, 1929, the Roberts Manufacturing Company, in open court, bid and offered in writing to purchase and to pay the sum of Forty-two Thousand Five Hundred Dollars ($42,500.00), for the assets of the Thomas Day Co. hereinafter described; thereupon on said day your petitioner, as such Receiver, accepted said bid and sold the interest of said corporation in and to said assets, subject to confirmation of said sale by this court.

Said assets hereinabove referred to, and the interest of said corporation therein, so sold as aforesaid, are as follows:

All the assets of every character and description belonging to or used in the business of Thomas Day Company, except [34] accounts receivable; all goods, wares and merchandise of every kind and character contained in the four-story and basement building known as #725 Mission Street, San Francisco, California, and in the place of business of

Thomas Day Company in the Barker Brothers Building, Los Angeles, or in warehouses or other places; all furniture, fittings, furnishings and fixtures of every kind and description contained in the offices or other places of business of Thomas Day Company; all machinery, tools, equipment, appliances, and other personal property contained in or used in said company's factory; all patents, patent rights, chucks, dies, patterns, catalogs, drawings, details and all applicances and equipment of the designing department of said business, together with all samples and all automobiles or delivery vehicles; the business and the goodwill of the business of Thomas Day Company; the right of the purchaser to hold itself out as the successor of Thomas Day Company and as having acquired the goodwill thereof.

The terms and conditions of sale are cash, lawful money of the United States, 10 per cent at the time of sale and the balance upon confirmation by the above-entitled court.

WHEREFORE, your Petitioner prays that an order be made herein confirming said sale and authorizing your petitioner, as such Receiver, to deliver possession of the above-described property to the purchaser thereof, subject to the following terms and conditions:

1. The Receiver reserves all right, title and interest in and to all work in process.

2. The Receiver reserves the right to the exclusive use of all factory equipment and machinery necessary to complete said work in process. [35]

3. The Receiver agrees to pay the rent for the premises during the time he retains possession.

4. The Receiver agrees to pay the purchaser for all materials used in completing said work in process.

5. The Receiver agrees to enter into no new contracts from and after the date of sale.

And your petitioner further prays for such other and further orders as shall be just and proper.

CLAUDE R. KING,
Receiver, Thomas Day Company,
Petitioner.

CHARLES A. CHRISTIN,
KNIGHT, BOLAND & CHRISTIN,
Attorneys for Receiver.

[Endorsed]: Filed Nov. 25, 1929. [36]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 25th day of November, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable A. F. ST. SURE, District Judge.

(Title of Cause.)

MINUTES OF COURT—NOVEMBER 25, 1929—
ORDER CONFIRMING SALE OF ASSETS.

The petition for the confirmation of sale of personal property came on to be heard, Arthur Dunn, Jr., Esq., appearing for the Receiver; Sterling Carr, Esq., appearing for certain stockholders of the Thomas Day Company and for the Thomas Day Company and Theodore J. Savage, Esq., appearing for the Roberts Manufacturing Company, the buyer, Mr. Carr objected to the confirmation of the sale on behalf of certain stockholders, and the Thomas Day Company, and after hearing had, IT IS ORDERED that said objection be overruled and exception allowed to the ruling of the Court. Thereupon, IT IS ORDERED that the sale of the property to the Roberts Manufacturing Company for the sum of $42,500.00 be confirmed in accordance with an order this day signed and filed. [37]

(Title of Court and Cause.)

ORDER CONFIRMING SALE OF ASSETS.

Comes now Claude R. King, Receiver of the Thomas Day Company, by Charles A. Christin, and Knight, Boland & Christin, his attorneys, and proves to the satisfaction of the Court that his return of sale of real estate under the notice of sale heretofore

given and made was duly filed in the office of the Clerk; that Monday, November 25, 1929, was the day fixed for hearing; and that said Receiver gave due notice of said hearing to all creditors of said corporation in form and manner as required by this Court, and the hearing of said return coming on regularly this day, after examining the return and hearing the evidence, the Court finds therefrom that said sale was legally made and fairly conducted; that notice of the time, place and terms of sale was duly given in manner and form as prescribed by this Court, and that the price obtained thereat was the reasonable value of the property sold, and that no greater sum can be obtained, and no person objecting thereto or offering a higher price,

IT IS HEREBY ORDERED by the Court that the sale of the property hereinafter described, to Roberts Manufacturing Company, for the sum of forty-two thousand five hundred dollars in cash be, and the same is hereby confirmed, and upon the payment of the price aforesaid, said Claude R. King, Receiver as aforesaid, is authorized and directed to execute to said purchaser a deed of conveyance and bill of sale thereof.

Said assets so sold are: All the assets of every character and description belonging to or used in the business of Thomas Day Company, except accounts receivable; all goods, wares and merchandise of every kind and character contained [38] in the four-story and basement building known as 725 Mission Street, San Francisco, California, and in the place of business of Thomas Day Company in the Barker

Brothers Building, Los Angeles, or in warehouses or other places; all furnitures, fittings, furnishings, and fixtures of every kind and description contained in the offices or other places of business of Thomas Day Company; all machinery, tools, equipment, appliances, and other personal property contained in or used in said company's factory; all patents, patent rights, chucks, dies, patterns, catalogs, drawings, details and all appliances and equipment of the designing department of said business, together with all samples and all automobiles or delivery vehicles; the business and the goodwill of the business of Thomas Day Company; the right of Roberts Manufacturing Company to hold itself out as the successor of Thomas Day Company and as having acquired the goodwill thereof.

IT IS FURTHER ORDERED that all of the above-mentioned property be delivered to Roberts Manufacturing Company by the Receiver upon payment of said purchase price, SAVE AND EXCEPT that said Receiver is hereby authorized to reserve to himself all title to the work in process, and to the exclusive use of the factory and equipment used therein for the period of ninety days after delivery of said property to said Roberts Manufacturing Company.

IT IS FURTHER ORDERED that said Receiver shall pay said Roberts Manufacturing Company for all materials used in completing said work in process, and shall pay the rent for said factory during his occupancy.

IT IS FURTHER ORDERED that said Receiver accept no further contracts for work after the payment to him of the purchase price hereinabove mentioned.

Done in open court this 25th day of November, 1929.

A. F. ST. SURE,
Judge of the U. S. District Court.

[Endorsed]: Filed Nov. 25, 1929. [39]

(Title of Court and Cause.)

DEED OF CONVEYANCE AND BILL OF SALE.

WHEREAS, the United States District Court for Northern District of California, Southern Division, did on the 25th day of November, 1929, duly give and make its "Order Confirming Sale of Assets" in a cause therein pending entitled Gill Virden Company, a corporation, Complainant, vs. Thomas Day Company, a Corporation, Defendant, being action No. 2244–S, a copy of which said Order Confirming Sale of Assets, marked Exhibit "A," is hereto attached and made a part hereof; said Order Confirming Sale of Assets will be hereinafter referred to as "said order"; and

WHEREAS, Roberts Manufacturing Company, the purchaser named in said order, has paid to the undersigned as such Receiver the full sum of Forty-

two Thousand Five Hundred ($42,500.00) Dollars, being the purchase price named in said order,—

NOW, THEREFORE, the said Claude R. King, Receiver of the Thomas Day Company, does hereby as such Receiver and pursuant to said order grant, convey, sell, assign, and transfer unto said Roberts Manufacturing Company (a California corporation) all of the assets of Thomas Day Company described in said order, together with the business and the goodwill of the business of Thomas Day Company, and the right of Roberts Manufacturing Company to hold itself out as the successor of Thomas Day Company and as having acquired the goodwill thereof.

SUBJECT to the provisions of said order relative to the retention by the Receiver of the factory and equipment thereof for a period of ninety days as set forth in said order and in said Receiver's Return of Sale filed in said court and [40] cause on the 25th day of November, 1929.

Dated: November 25th, 1929.

CLAUDE R. KING,
Receiver of Thomas Day Company.

EXHIBIT "A."

In the Southern Division of the United States District Court, for the Northern District of California.

No. 2244–S.

GILL VIRDEN COMPANY, a Corporation,
Complainant,

vs.

THOMAS DAY COMPANY, a Corporation,
Defendant.

ORDER CONFIRMING SALE OF ASSETS.

Comes now Claude R. King, Receiver of the Thomas Day Company, by Charles A. Christin and Knight, Boland & Christin, his attorneys, and proves to the satisfaction of the Court that his return of sale of real estate under the notice of sale heretofore given and made was duly filed in the office of the Clerk; that Monday, November 25, 1929, was the day fixed for hearing, and that said Receiver gave due notice of said hearing to all creditors of said corporation in form and manner as required by this Court, and the hearing of said return coming on regularly this day, after examining the return and hearing the evidence, the Court finds therefrom that said sale was legally made and fairly conducted; that notice of the time, place and terms of sale was duly given in manner and form as prescribed by this Court, and that the price obtained

thereat was the reasonable value of the property sold, and that no greater sum can be obtained, and no person objecting [41] thereto or offering a higher price,

IT IS HEREBY ORDERED by the Court that the sale of the property hereinafter described, to Roberts Manufacturing Company, for the sum of forty-two thousand five hundred dollars in cash be, and the same is hereby confirmed, and upon the payment of the price aforesaid, said Claude R. King, Receiver as aforesaid, is authorized and directed to execute to said purchaser a deed of conveyance and bill of sale thereof.

Said assets so sold are: all the assets of every character and description belonging to or used in the business of Thomas Day Company, except accounts receivable; all goods, wares and merchandise of every kind and character contained in the four-story and basement building known as 725 Mission Street, San Francisco, California, and in the place of business of Thomas Day Company in the Barker Brothers Building, Los Angeles, or in warehouses or other places; all furniture, fittings, furnishings and fixtures of every kind and description contained in the offices or other places of business of Thomas Day Company; all machinery, tools, equipment, appliances and other personal property contained in or used in said company's factory; all patents, patent rights, chucks, dies, patterns, catalogs, drawings, details and all appliances and equipment of the designing department of said business, together with all samples and all automobiles

or delivery vehicles; the business and the good will of the business of Thomas Day Company, the right of Roberts Manufacturing Company to hold itself out as the successor of Thomas Day Company and as having acquired the good will thereof.

IT IS FURTHER ORDERED that all of the above-mentioned property be delivered to Roberts Manufacturing Company by the Receiver upon payment of said purchase price, SAVE AND EXCEPT that said Receiver is hereby authorized to reserve to himself [42] all title to the work in process, and to the exclusive use of the factory and equipment used therein for the period of ninety days after delivery of said property to said Roberts Manufacturing Company.

IT IS FURTHER ORDERED that said Receiver shall pay said Roberts Manufacturing Company for all materials used in completing said work in process, and shall pay the rent for said factory during his occupancy.

IT IS FURTHER ORDERED that said Receiver accept no further contracts for work after the payment to him of the purchase price hereinabove mentioned.

Done in open court this 25th day of November, 1929.

A. F. ST. SURE,
Judge of the U. S. District Court.

[Endorsed]: Filed Nov. 26, 1929. [43]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

The above-named defendant, Thomas Day Company, a corporation, and Whitman Symmes, a stockholder of said defendant corporation, feeling themselves aggrieved by the Order Confirming Sale of the Assets of said defendant corporation made and entered in this action on the 25th day of November, 1929, do hereby appeal from said Order of Sale to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith and they pray that their appeal be allowed, and that a citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in the city of San Francisco, California; and

Your petitioners further pray that a proper order [44] specifying the security to be required of them to perfect their appeal be made.

THOMAS, BEEDY, PRESLEY & PARAMORE,

GEORGE J. PRESLEY,

Attorneys for Defendant Corporation Thomas Day Company.

STERLING CARR,

Attorney for Whitman Symmes.

The above and foregoing petition for an appeal is granted and appeal allowed upon giving for costs bond conditioned as required by law, in the sum of $500.00.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Dec. 20, 1929. [45]

[Endorsed]: Filed Dec. 26, 1929.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant Thomas Day Company, a corporation, and Whitman Symmes, a stockholder of said defendant corporation, appellants in the above-entitled suit and in connection with their petition for an appeal in this case assign the following errors which said appellants aver have occurred and upon which they rely to reverse the decree entered thereon as appears of record.

The Court erred:

1. In the making and entering of its Order Confirming Sale of the Assets of the above defendant corporation dated November 25, 1929, in that:

(a) The Receiver of said corporation had no authority to sell the assets of said corporation under the notice of sale dated October 31, 1929, as follows: [46]

"NOTICE OF SALE OF ASSETS AT COURT SALE.

"In the Southern Division of the United States District Court, for the Northern District of California.

"GILL VIRDEN COMPANY, a Corporation,
Complainant,

vs.

THOMAS DAY COMPANY, a Corporation,
Defendant.

"NOTICE OF SALE OF ASSETS AT COURT SALE.

"Notice is hereby given that the undersigned Claude R. King, Receiver of the Thomas Day Company, a corporation, will sell, Tuesday, the 12th day of November, 1929, in open Court, at ten o'clock a. m. of said day, at the courtroom of the above-entitled Court, before Honorable A. F. St. Sure, Post Office Building, Seventh and Mission Streets, San Francisco, California, for cash, to the highest bidder therefor, the following:

"All the assets of every character and description belonging to or used in the business of Thomas Day Company, except accounts receivable; all goods, wares and merchandise of every kind and character contained in the four-story and basement building known as 725 Mission Street, San Francisco, California, and in the place of business of Thomas Day

Company in the Barker Brothers Building, Los Angeles, or in warehouses or other places; all furniture, fittings, furnishings and fixtures of every kind and description contained in the offices or other places of business of Thomas Day Company; all machinery, tools, equipment, appliances, and other personal property contained in or used in said company's factory; all patents, patent rights, chucks, dies, patterns, catalogs, drawings, details and all appliances and equipment of the designing department of said business, together with all samples and all automobiles or delivery vehicles; the business and the good will of the business of Thomas Day Company; the right of the purchaser to hold itself out as the successor of Thomas Day Company and as having acquired the good will thereof.

"The terms and conditions of sale are cash, lawful money of the United States, 10 per cent at the time of sale and the balance upon confirmation by the above-entitled Court.

"All of the above-mentioned property will be delivered to the purchaser upon confirmation, save and except that the Receiver of the Thomas Day Company reserves to himself all work in process and the exclusive use of the factory and equipment therein and therefor for the period of ninety days after said confirmation.

"Dated October 31, 1929.

"CLAUDE R. KING,

"Federal Receiver of Thomas Day Company.

"CHARLES A. CHRISTIN,

"KNIGHT, BOLAND & CHRISTIN,

"Balfour Building, San Francisco, California,

"Attorneys for Receiver."

"Oct. 31 to Nov. 12, inclusive—dly." [47]

(b) The Receiver of said corporation had no authority to set forth in said notice of sale that he would sell the goodwill of the business of the Thomas Day Company and/or the right of the purchaser to hold itself out as successor of the Thomas Day Company and as having acquired the goodwill thereof;

(c) The Receiver of said corporation had no authority to make a sale of the right of the purchaser of the assets of said corporation to hold itself out as the successor of the Thomas Day Company, defendant herein, all as set forth in the said notice of sale of assets;

(d) The Receiver had no jurisdiction over the goodwill and/or the name "Thomas Day Company";

(e) The Receiver had no jurisdiction or right to give, sell or grant to said purchaser the right to hold itself out as the successor of Thomas Day Company.

2. That the above-entitled court was without jurisdiction;

(a) To make and enter an order confirming the sale by the Receiver of said defendant corporation

of the goodwill and/or the name "Thomas Day Company";

(b) To make any order confirming the sale of the goodwill and/or the name "Thomas Day Company";

(c) To make an order granting said purchaser the right to hold itself out as the successor of Thomas Day Company.

WHEREFORE, the defendant Thomas Day Company, a corporation, and Whitman Symmes, a stockholder of said defendant corporation, appellants herein, pray that the said order be reversed and that the said District Court be instructed to [48] enter such decree or order as the Circuit Court of Appeals shall deem meet and proper on the records.

THOMAS, BEEDY & PRESLEY,
GEORGE PRESLEY,
Attorneys for Thomas Day Company, Defendant Corporation.

STERLING CARR,
Attorney for Whitman Symmes, Appellants.

[Endorsed]: Filed Dec. 20, 1929. [49]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, BALTIMORE.

The premium charged for this bond is $10.00 per annum.

(Title of Court and Cause.)

BOND ON APPEAL.

WHEREAS, an order was made November 25, 1929, confirming sale of the assets of the above-mentioned Thomas Day Company, a corporation, and

WHEREAS, the said Thomas Day Company, a corporation and Whitman Symmes, a stockholder of said corporation, feeling dissatisfied with said order, are desirous of appealing to the United States Circuit Court of Appeals for the Ninth District, sitting in the City and County of San Francisco, State of California,—

NOW, THEREFORE, in consideration of the premises, the undersigned Fidelity and Deposit Company of Maryland, a body corporate, duly incorporated under the laws of the State of Maryland and authorized to act as Surety, under the act of Congress approved August 13, 1894, whose principal office is located at Baltimore, State of Maryland, does hereby undertake and promise on the part of the said Thomas Day Company and Whitman Symmes, that they will prosecute their said appeal to effect and answer all costs if they fail to make good their plea and appeal, not exceeding the

sum of Five Hundred and No/100 ($500.00) Dollars, to which amount it acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above-entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said surety is [50] bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

Dated at San Francisco, California, this 20th day of December, A. D. 1929.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

By GUERTIN CARROLL,
Attorney-in-Fact.

[Seal] Attest: C. A. BEVANS,
Agent.

Approved this 21st day of Dec. 1929.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Dec. 21, 1929. [51]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court for the Northern District of California:

Please prepare, certify and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the transcript of the record in the above-entitled action containing the following portions of the record to wit:

1. Bill in equity for Receiver.
2. Answer of defendant.
3. Order appointing Receiver.
4. Substitution of attorneys for defendant.
5. Petition for appointment of temporary Receiver filed September 11, 1929.
6. Order appointing temporary Receiver filed September 11, 1929.
7. Amended petition for appointment of temporary Receiver filed September 20, 1929.
8. Order appointing temporary Receiver filed September 30, 1929. [52]
9. Petition for confirmation of sale, or for the adoption of a reorganization plan, or for the continuation of receivership, filed September 23, 1929.
10. Notice of sale dated October 31, 1929.
11. Opposition of defendant to petition of Receiver to sell the goodwill and the right of the purchaser of the assets to hold itself out as the successor of Thomas Day Company.

12. Opposition of Whitman Symmes, Mabel Symmes, Anson Blake and Anita D. S. Blake to petition of Receiver to sell the goodwill of defendant and the right of the purchaser of the assets to hold itself out as the successor of Thomas Day Company.
13. Receiver's return of sale.
14. Order confirming sale of assets.
15. Bill of conveyance and bill of sale.
16. Minutes of the Court of November 25, 1929, upon the hearing of the confirmation of the sale of assets.
17. Petition for appeal and order of allowance thereof.
18. Assignment of errors.
19. Bond on appeal.
20. Citation on appeal.
21. Copy of this praecipe.

Dated this 26th day of December, 1929.

THOMAS, BEEDY & PRESLEY,
GEORGE PRESLEY,

Attorneys for Thomas Day Company, Defendant Corporation.

STERLING CARR,
Attorney for Whitman Symmes.

Received a copy of the within this 26th day of December, 1929.

KNIGHT, BOLAND & CHRISTIN.
ARTHUR DUNNE.
THEODORE J. SAVAGE,
Attorney for Roberts Manufacturing Co.

[Endorsed]: Filed Dec. 26, 1929. [53]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 53 pages, numbered from 1 to 53, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $21.50; that the said amount was paid by the appellant and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 17th day of February, A. D. 1930.

[Seal] WALTER B. MALING,

Clerk United States District Court for the Northern District of California. [54]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Claude R. King, Receiver of Thomas Day Com-

pany, and to Charles A. Christin, Esq., and Knight, Boland and Christin, Esqrs., His Attorneys, and to the Roberts Manufacturing Company and to Theodore J. Savage, Esq., Its Attorney, and to Gill Virden Company and to Arthur Dunn, Jr., Its Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California from an order confirming sale of assets of the above-entitled corporation by Claude R. King, its Receiver, to the Roberts Manufacturing Company, filed and entered on the 25th day of November, 1929, in that certain suit being in Equity No. [55] 2244–S, wherein Gill Virden Company, a corporation, is plaintiff and Thomas Day Company, a corporation, is defendant and the said Thomas Day Company, a corporation, and Whitman Symmes, are appellants, and you are appellees, to show cause, if any there be, why the said order confirming sale of assets, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States District Judge for the Northern Dis-

trict of California, this 20th day of December, A. D. 1929.

A. F. ST. SURE,
United States District Judge. [56]

Received a copy of the within this 26th day of December, 1929.

KNIGHT, BOLAND & CHRISTIN.
ARTHUR DUNNE.
THEODORE J. SAVAGE,
Atty. for Roberts Manufacturing Co.

[Endorsed]: Filed Dec. 26, 1929.

[Endorsed]: No. 6077. United States Circuit Court of Appeals for the Ninth Circuit. Thomas Day Company, a Corporation, and Whitman Symmes, Appellants, vs. Claude R. King, Receiver of Thomas Day Company, Roberts Manufacturing Company, a Corporation, and Gill Virden Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 18, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS DAY COMPANY, a corporation, and WHITMAN SYMMES,

Appellants,

vs.

CLAUDE R. KING, Receiver of Thomas Day Company, ROBERTS MANUFACTURING COMPANY, a corporation, and GILL VIRDEN COMPANY, a corporation,

Appellees.

APPELLANTS' BRIEF.

THOMAS, BEEDY, PRESLEY & PARAMORE,
315 Montgomery Street, San Francisco,
Attorneys for Thomas Day Company.

STERLING CARR,
310 Sansome Street, San Francisco.
Attorney for Whitman Symmes.

Parker Printing Company, 523 Clay Street, San Francisco

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Table of Cases Cited

No. 6077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS DAY COMPANY, a corporation, and WHITMAN SYMMES,

Appellants,

vs.

CLAUDE R. KING, Receiver of Thomas Day Company, ROBERTS MANUFACTURING COMPANY, a corporation, and GILL VIRDEN COMPANY, a corporation,

Appellees.

APPELLANTS' BRIEF.

FOREWORD.

This appeal is taken from an order confirming a sale of the assets of the Thomas Day Company made by the United States District Court for the Northern District of California, Southern Division, in an equity action brought in that court entitled "Gill Virden Company, a corporation, complainant v. Thomas Day Company, a corporation, defendant". This order provided that the purchaser, the Roberts Manufacturing Company, was entitled to the good-will of the business

of Thomas Day Company, *and the right of the said Roberts Manufacturing Company to hold itself out as the successor of the Thomas Day Company* and as having acquired the good-will thereof. Appellants contend that the District Court had no jurisdiction to include in such order of sale the right of said Roberts Manufacturing Company *to hold itself out as the successor of the Thomas Day Company.*

STATEMENT OF THE CASE.

The complainant in the action of *Gill Virden Company v. Thomas Day Company* is a Pennsylvania corporation organized for the purpose of doing a general manufacturing business and for the sale of articles necessary for the manufacture of lighting fixtures. The defendant, Thomas Day Company, is a California corporation organized for the purpose of manufacturing and selling lighting fixtures and equipment.

On the 3rd day of December, 1928 the Gill Virden Company filed its bill in equity on its behalf and on behalf of all other creditors of the Thomas Day Company against the said Thomas Day Company for the appointment of a receiver to take possession of its property, business and assets (Trans. pp. 2-9). On the same day the said Thomas Day Company filed its answer admitting the allegations of said bill in equity as true and joined in the prayer of said bill for the appointment of a receiver (Trans. pp. 9-11). Pursuant to said bill and answer the District Court on the

3rd day of December, 1928, upon the motion of the attorney for said Gill Virden Company, made its order appointing one Charles F. Duval as the receiver of said Thomas Day Company, and of all of its property and assets (Trans. pp. 11-13). That the said Charles F. Duval pursuant to said order took possession of said business, property and assets of said Thomas Day Company. The said Charles F. Duval continued as receiver until the 10th day of September, 1929 when he was killed in an automobile accident. Thereupon and on the 20th day of September, 1929, one Charles F. King was appointed the temporary receiver of the said Thomas Day Company (Trans. pp. 14-22). That he now is the duly qualified and acting temporary receiver of the said Thomas Day Company and of all of its property and assets.

On the 23rd day of September, 1929, Claude R. King, the temporary receiver, filed his "petition for confirmation of sale, or for the adoption of a reorganization plan" (Trans. pp. 23-29). This petition was not acted upon for the reason that the District Court held that it did not have the right or jurisdiction to sell the name "Thomas Day Company". Subsequently and on the 31st day of October the temporary receiver published a "notice of sale of assets at court sale", to be held on the 12th day of November, 1929 in open court at 10 A. M. This notice of sale offered the business and the good-will of the business of Thomas Day Company and *the right of the purchaser to hold itself out as the successor of the Thomas Day Company* and as having acquired the

good-will thereof (Trans. pp. 30-34). On the 17th day of November, 1929, the Roberts Manufacturing Company in open court bought the business, assets and good-will of the said Thomas Day Company, *with the right to hold itself out as the successor of said Thomas Day Company* and as having acquired the good-will thereof, said sale, however, being subject to confirmation by the court on the 25th day of November, 1929.

Thereupon, on the 18th day of November, 1929, Whitman Symmes, Mabel Symmes, Anson Blake and Anita Blake, filed their opposition to the petition of the receiver to sell the right of the purchaser to hold itself out as the successor of Thomas Day Company (Trans. pp. 34-37). Subsequently, and on the 25th day of November, 1929, and at the time of such hearing, the said Thomas Day Company filed its opposition to the petition of said receiver to sell the good-will of the Thomas Day Company and the *right of the purchaser to hold itself out as the successor of Thomas Day Company* (Trans. pp. 37-39).

On November 25, 1929, the petition for confirmation of the sale came on for hearing and the objections to the sale were overruled, to which the opposing parties took an exception which was allowed by the court. Thereupon it was ordered the sale be confirmed (Trans. pp. 43-47).

ASSIGNMENTS OF ERROR.

The errors asserted and relied upon by appellants are as follows (Trans. pp. 52-56):

The court erred:

1. In the making and entering of its order confirming sale of the assets of the above defendant corporation dated November 25, 1929, in that:

(a) The receiver of said corporation had no authority to sell the assets of said corporation under the notice of sale dated October 31, 1929, appearing in Trans. pp. 53-54.

(b) The receiver of said corporation had no authority to set forth in said notice of sale that he would sell the good-will of the business of the Thomas Day Company and/or the right of the purchaser to hold itself out as successor of the Thomas Day Company and as having acquired the good-will thereof;

(c) The receiver of said corporation had no authority to make a sale of the right of the purchaser of the assets of said corporation to hold itself out as the successor of the Thomas Day Company, defendant herein, all as set forth in the said notice of sale of assets;

(d) The receiver had no jurisdiction over the good-will and/or the name "Thomas Day Company";

(e) The receiver had no jurisdiction or right to give, sell or grant to said purchaser the right to hold itself out as the successor of Thomas Day Company.

2. That the above-entitled court was without jurisdiction:

(a) To make and enter an order confirming the sale by the receiver of said defendant corporation of the good-will and/or the name "Thomas Day Company";

(b) To make any order confirming the sale of the good-will and/or the name "Thomas Day Company";

(c) To make an order granting said purchaser the right to hold itself out as the successor of Thomas Day Company.

BRIEF OF ARGUMENT.

At the outset it is admitted that the receiver had the authority to make, and the court the power to confirm, a sale of the business and physical assets and also the good-will of the business of Thomas Day Company;

But it is contended that the receiver had no authority to make, or the court to approve, a sale of the right of the purchaser to hold itself out as the successor of Thomas Day Company. This for the reason that the receiver could not make a sale of the name of the corporation Thomas Day Company or of its franchise to be a corporation, and therefore could not authorize the purchaser to hold itself out as the successor of Thomas Day Company, for to permit such a sale would be to allow the receiver to do that indirectly which he could not do directly.

Note, please, that the order did not state that the purchaser might hold itself out as the successor of the business and good-will of Thomas Day Company, but as the successor of Thomas Day Company, thus clearly implying to the public that it had acquired the right to the name Thomas Day Company and to its corporate functions.

I.

THE MANAGEMENT AND OPERATION OF THE PROPERTY BY THE RECEIVER MUST BE IN ACCORDANCE WITH THE REQUIREMENTS OF THE VALID LAWS OF THE STATE OF CALIFORNIA.

Judicial Code, Section 65, March 3, 1911, Chapter 231, Section 65, 36 Stat. 1104, U. S. C. A. 28, Section 124.

"Management of property by receivers. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000., or imprisoned not more than one year, or both."

In *Mercantile Trust Co. v. Tennessee Central R. R. Co.,* 286 Fed. 425, it was held that a state statute governs the operations of a railroad by a receiver appointed by the federal court.

Likewise, in *Erb v. Morasch,* 177 U. S. 584, it was held that a federal receiver must operate a railroad in accordance with the ordinance of a city regulating the speed of the trains through such a city.

II.

IN ORDERING SALES BY RECEIVERS APPOINTED BY THE DISTRICT COURT, THE STATE LAWS GOVERNING THE SAME WILL BE FOLLOWED BY SUCH COURT.

Stokes v. Williams, 226 Fed. 148; C. C. A. 3d Circuit, Subdivision 4.

In the *Stokes* case the court held:

> "It is not error for the District Court to decree a private sale of a corporation's assets and rights, upon terms proposed to its receivers by the creditors of the corporation, without requiring public notice thereof by advertisement or otherwise, notice of the offer with opportunity to object having been given each creditor and stockholder, in view of P. L. N. J. 1896, p. 298, empowering receivers to transfer the assets, rights, and interests of the corporations for which they act, and in view of the power of the state courts to determine and control the terms of such sales and to sell either at public or private sale."

In the case of *American Mine Equipment Company v. Illinois Coal Corporation,* 31 Fed. 2nd 507 (C. C. A. 7th Circuit) it was held:

> "Statutes providing for redemption from judicial sales constitute a rule of property in their respective states, and are binding upon courts of chancery as well as law, and will be given effect in the federal courts. Brine v. Insurance Co., 96 U. S. 627, 24 L. Ed. 858."

In

Pierrepont v. Fidelity-Philadelphia Trust Co., 32 Fed. (2d) 608,

it was held:

"Susbtantial rights resting on state statutes or decisions, especially when they constitute rules of property, are as obligatory on federal courts in equity as on the state courts."

III.

THE APPOINTMENT OF A RECEIVER FOR A CORPORATION DOES NOT SUSPEND THE CORPORATE FUNCTIONS.

The rule is laid down in

14A *Corpus Juris,* page 977, Sec. 3217:

"The mere appointment of a receiver for a corporation will not work its dissolution. This is so, although the property of the corporation is sold, and the corporation deprived of its books and records on sale of its assets, and although the decree appointing the receiver also enjoins the corporation from the exercise of its powers and franchises. Notwithstanding the appointment of a receiver, the corporate existence continues, and its corporate identity is preserved, until its dissolution is effected in some one of the manners subsequently described; and the corporation may exercise its corporate powers and franchises, except as to the matters especially confided to the receiver by the court, or where the exercise of such franchises would interfere with the rightful management of its affairs by the receiver so far as his duties are defined by the court appointing him. * * *"

Probably the leading case on this question is

Chemical National Bank of Chicago v. Hartford Deposit Company, 161 U. S. 1,

where it was held that:

"The appointment of a receiver for a national bank does not, in itself, put an end to the cor-

porate existence of the bank so as to prevent the rendition of a judgment against it."

In

Standard Roller Bearing Co. v. Hess-Bright Mfg. Co., 275 Fed. 916 (C. C. A. Third),

on page 920, the Court said:

"We are not persuaded that the corporation suffered an entire suspension of its functions and authority over its property by the appointment of receivers. True, acts done in violation of a receivership injunction may be void, but courts are inclined to hold them void only at the election of the injured party. Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441; Union Trust Co. v. Southern Navigation Co., 130 U. S. 565, 570, 571, 9 Sup. Ct. 606, 32 L. Ed. 1043. Nor have we in mind a case where an act done in violation of such an injunction has been undone by a court upon the application of the wrongdoer. Greenwald v. Roberts, 4 Heisk. (Tenn.) 494. There is a broad distinction between acts of a corporation in receivership which are violative of an injunction, in hindrance of the administration of the estate, or in depletion of its assets, and conduct which depends for its validity on the life of the corporation. The appointment of a receiver does not dissolve the corporation or suspend its existence. Chemical National Bank v. Hartford Deposit Co., 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595; Du Pont v. Standard Arms Co., 9 Del. Ch. 315, 320, 81 Atl. 1089. It still is the same corporate entity that it was before. It is clothed with the same franchises and its corporate powers continue to exist, subject in their exercise, of course, to limitations arising out of the changed situation. O. & M. Ry.

Co. v. Russell, 115 Ill. 52, 57, 3 N. E. 561; Linn v. Dixon Crucible Co., 59 N. J. Law, 28, 30, 35 Atl. 2; Rosenbaum v. U. S. Credit System Co., 61 N. J. Law, 543, 40 Atl. 591."

IV.

LIKEWISE, THE APPOINTMENT OF THE PRESENT RECEIVER DID NOT DISSOLVE THOMAS DAY COMPANY AND, THEREFORE, NEITHER THE RECEIVER NOR THE COURT HAD ANY JURISDICTION OR AUTHORITY OVER THE NAME OR FRANCHISE OF SUCH COMPANY.

Standard Roller Bearing Co. v. Hess-Bright Mfg. Co., supra.

"A Court of Equity in the absence of statute has no right to wind up, dissolve or annihilate a corporation or deprive it of its rights to live given by the Legislature."

Clark on Receivers, Vol. 1, page 240.

"A corporation is a distinct entity, its affairs are necessarily managed by officers and agents, it is true, but in law it is as distinct a being as an individual as an individual is, and is entitled to hold property if not contrary to its charter, as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same."

Clark on Receivers, supra.

"A Court of Equity has not the power to wind up or dissolve or annihilate an individual nor to take away his civil rights."

Clark on Receivers, Vol. 1, page 239.

"In the absence of express statutory authority the court has no authority at the suit of an individual or a minority stockholder to dissolve a corporation, wind up its affairs, and distribute its assets."

Feess v. Mechanics' State Bank, 84 Kansas 828, 115 Pac. Rep. 563.

"The power to wind up the affairs of a corporation and to dissolve it, is not one which inheres in the courts, but exists only when confirmed by statute."

Union Savings & Investment Co. v. District Court, 44 Utah 397, 140 Pac. Rep. 221.

In

Murray v. Superior Court, 129 Cal. 628,

at the bottom of page 631, the Court said:

"It will be observed that the above section provides for the appointment of a receiver only 'upon dissolution of the corporation.' The corporation not having been dissolved it is evident that the section does not authorize the appointment of the receiver. It is said by Beach in his work on Receivers, section 86: 'The courts have not the power to appoint receivers to wind up the affairs of a corporation in the absence of statutory provisions.'"

On page 632, the Court further said:

"This court passed upon the particular subdivision of said section in La Societe Francaise D'Epargnes etc. v. District Court, 53 Cal. 495, 553, and in the opinion said: 'The particular subdivision, however, which is supposed to confer the power in question and to authorize the district court to appoint a receiver of the property

of this corporation, is the fifth—being the only portion of the statute in which corporations are named: "A receiver may be appointed * * * in the cases when a corporation * * * is insolvent."

'There is, of course, no such thing as an action brought distinctively for the mere appointment of a receiver; such an appointment, when made, is ancillary to or in aid of the action brought. Its purpose is to preserve the property pending the litigation, so that the relief awarded by the judgment, if any, may be effective. The authority conferred upon the court to make the appointment necessarily presupposes that an action is pending before it, instituted by some one authorized by law to commence it. But there is no statute in this state, none to which we have been pointed, which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a receiver.' This construction of the subdivision was followed and approved by this court in bank in the late case of Fischer v. Superior Court, 110 Cal. 141. (See Neall v. Hill, 16 Cal. 150; Fischer v. Superior Court, supra; Havemeyer v. Superior Court, 84 Cal. 364; People's Home Sav. Bank v. Superior Court, 103 Cal. 27; Harrison v. Hebbard, 101 Cal. 152.)"

A California corporation may only be dissolved in one of two ways, first by an action of the state itself through its proper officers, or by a voluntary dissolution as provided in the *Code of Civil Procedure,* commencing with Section 1227.

In

Lyon v. Carpenters' Hall Assn., 66 Cal. App. at page 552

(re-hearing denied by Supreme Court) the rule is set forth as follows:

> "If Carpenters' Hall Association (a corporation) had suffered no forfeiture, or if it had not been dissolved, the courts would have no right through a receiver to take possession of the corporation's property, to sell the property, or to distribute the proceeds among the persons entitled thereto, because the law has placed all of those powers in the hands of the directors of the corporation. (Civ. Code, sec. 305.)
>
> "No statute is cited, and we know of no statute, which declares that the foregoing set of facts constitute a forfeiture. Of course, if there were a statute to that effect the statute would be recognized and administered by the court according to its terms. (Los Angeles Ry. v. Los Angeles, 152 Cal. 242 [125 Am. St. Rep. 54, 15 L. R. A. (N. S.) 1269, 92 Pac. 490]; Kaiser Land and Fruit Co. v. Curry, 155 Cal. 638 [103 Pac. 341].) In the absence of a statute to the contrary, it is the settled law of California that the state only is entitled to maintain an action to have it adjudged that a forfeiture has occurred and to enforce such forfeiture. In People v. Los Angeles Elec. Ry. Co., 91 Cal. 338, 340 [27 Pac. 673, 674], the court says: 'Acts sufficient to cause a forfeiture do not per se produce a forfeiture. The corporation continues to exist until the sovereignty which created it shall, by proper proceedings in a proper court, procure an adjudication of forfeiture and enforce it.' And see 26 C. J. 1045, sec. 117 and sec. 119.) Indeed, the rule is statutory. (Code Civ. Proc., sec. 803)."

V.

THE RECEIVER HAD NO AUTHORITY TO MAKE, AND THE COURT HAD NO JURISDICTION TO CONFIRM, A SALE OF ANY PROPERTY OF THOMAS DAY COMPANY WHICH COULD NOT BE REACHED ON AN EXECUTION SALE UNDER THE LAWS OF THE STATE OF CALIFORNIA.

This for the following reasons:

(a) A receiver's sale is in the nature of an execution sale in that property is taken from the debtor and sold without his consent;

(b) If property is not subject to execution it cannot be taken forcibly from the debtor.

Foster's Federal Practice, Vol. 2, page 1535.

> "A receiver may be appointed to preserve and take possession of every kind of property, whether the same be what is termed corporeal or incorporeal, *which can be seized by execution at law or which constitutes equitable assets.*"

In

Davis v. Gray, 16 Wall. 203, 21 L. Ed. 452,

the court said:

> "A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, *it might be taken in execution,* may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution."

VI.

THE RIGHT TO BE A CORPORATION IS A FRANCHISE AND TO ACQUIRE SUCH FRANCHISE UNDER THE GENERAL LAW THE REQUIRED STATUTORY CONDITIONS MUST BE COMPLIED WITH.

People v. Selfridge, 52 Cal. page 331.

This is the leading case in California on this subject and has been followed continuously.

Also see

Cal. Jur., Vol. 6, page 623.

VII.

THE FRANCHISE TO BE A CORPORATION CANNOT BE SOLD UNDER EXECUTION UNDER THE LAWS OF THE STATE OF CALIFORNIA.

Civil Code, Sec. 388,

provides:

> "For the satisfaction of any judgment against any person, company or corporation having any franchise *other than the franchise of being a corporation,* such franchise, and all rights and privileges thereof, may be levied upon and sold under execution, in the same manner, and with the same effect, as any other property."

In

Gregory v. Blanchard, 98 Cal. 313,

it is said:

> "In the absence of a statutory provision therefor, a franchise cannot be levied on or sold under

execution. (Freeman on Executions, sec. 179; Stewart v. Jones, 40 Mo. 140; Gue v. Canal Co., 24 How. 263.) Whenever such a provision exists, the extent as well as the mode of such levy and sale are limited thereby."

In

"Clark, the Law of Receivers" (1918), Vol. 1, page 676, Sec. 587

it is said:

"Most states by statute provide for a sale of franchises by a receiver of a railroad and for the purchaser to operate the property under those franchises. Unless there is such a statute it is difficult to see how a receiver can sell franchises which were given to the company unless the grant by the legislature contemplated such a sale."

VIII.

THE NAME OF A CORPORATION IS A PART OF ITS FRANCHISE AND THEREFORE CANNOT BE SOLD UNDER EXECUTION OR AT A RECEIVER'S SALE.

In

California Jurisprudence, Vol. 6, page 623,

it is stated:

"The right to be a corporation is in itself a franchise, and to acquire a franchise under a general law, the prescribed statutory conditions must be complied with. Certain things are made conditions precedent in such statutory process. Thus, it is a general rule that where the statute requires articles of incorporation to be filed before the proposed corporation is authorized to engage

> in the business for which it has been created, the filing of the articles in the manner prescribed constitutes a condition precedent to the right to perform corporate functions. Likewise, the omission of statements required to be contained in the articles of incorporation or other necessary prerequisites will prevent the formation of a de jure corporation."

and authorities cited.

Civil Code, Section 290,

provides:

> "That articles of incorporation shall state (1) the name of the corporation, etc."

In

California Jurisprudence, Vol. 6, pages 627, 628,

it is stated:

> "The name of the corporation must be set forth in the articles; and this name must not, of course, bear such a close resemblance to the name of another corporation as will tend to deceive. The secretary of state is forbidden to file the copy of the copy of articles or to issue the certificate of incorporation where a violation of this provision occurs. The statutes also forbid the use of certain words as a part of the corporate name of ordinary corporations, as, for instance, the words 'trust' or 'trustee'; and words indicating a banking business cannot be used unless the corporation is properly organized and authorized to do such business,"

and authorities cited.

A California corporation cannot change its name without an amendment of its articles and the com-

mencement of an action for such purpose and the securing of a decree therefor.

Civil Code, Section 362;

C. C. P., Sec. 1276, et seq.

The charter of a corporation is a contract which cannot be changed without the consent of both the state and the corporation. True, in California by reservations in the Constitution and the Codes, the state retains the power to amend the charter, but such reservation does not change the general principle or the fact that such a charter is a contract.

In

Memphis and Little Rock Railroad Company v. Berry, 112 U. S. 609,

the question arose as to whether or not a corporation purchasing at a mortgage sale all of the franchises and property of a corporation also *ipso facto,* under a statute of Arkansas having reference thereto, acquired the franchise of being a corporation possessed by the mortgagor, to such an extent as to acquire the exemption from taxation wherever extended by such statute to the mortgagor. The court held that it did not, and in the course of its discussion stated:

> "But, as was said by this court in Central R. R. and Banking Co. v. Georgia, 92 U. S. 665-670 [XXIII., 757-760], 'It is an unbending rule that a grant of corporate existence is never implied. In the construction of a statute every presumption is against it.'
>
> "The application of this rule is not avoided by the claim that the present is not the case of an original creation of a corporate body, but the

transfer, by assignment, of a previously existing charter and of the right to exist as a corporation under it. The difference is one of words, merely. The franchise of becoming and being a corporation, in its nature, is incommunicable by the act of the parties and incapable of passing by assignment. 'The franchise to be a corporation,' said Hoar, J., in Commonw. v. Smith, 10 Allen 448-455, 'clearly cannot be transferred by any corporate body of its own will. Such a franchise is not, in its own nature, transmissible.' In Hall v. Sullivan R. R. Co., 21 Law Rep., 138, 2 Redf. Rail. Cas., 621; 1 Brunner, Collected Cases, 613, Mr. Justice Curtis said: 'The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected.' No such positive provision is contained in the Act under consideration, and no mode for effecting the organization of a series of corporations under it is pointed out, either in the Act itself or in any other statute prior to that of December 9, 1874."

The quotation from the *Memphis* case was referred to and approved in

Julian v. Central Trust Co., 193 U. S. at page 106.

The extent to which the Federal Courts will go in the protection of the name adopted by a corporation is well stated in

American Steel Foundries v. Robertson, 269 U. S. 372 (46 Sup. Ct. Rep. 160),

at page 380, where it is said:

"The effect of assuming a corporate name by a corporation under the law of its creation is to

exclusively appropriate that name. It is an element of the corporation's existence. Newby v. Oregon Cent. Ry. Co. et al., Deady, 609, 616, 18 Fed. Cas. 38, No. 10,144. And, as Judge Deady said in that case:

'Any act which produces confusion or uncertainty concerning this name is well calculated to injuriously affect the identity and business of a corporation. And as a matter of fact, in some degree, at least, the natural and necessary consequence of the wrongful appropriation of a corporate name, is to injure the business and rights of the corporation by destroying or confusing its identity.'

"The general doctrine is that equity not only will enjoin the appropriation and use of a trademark or trade-name, where it is completely identical with the name of the corporation, but will enjoin such appropriation and use where the resemblance is so close as to be likely to produce confusion as to such identity, to the injury of the corporation to which the name belongs."

Therefore, the name Thomas Day Company, being part of the franchise of such corporation, was not subject to sale by the receiver.

IX.

THE SALE OF THE GOOD-WILL OF THOMAS DAY COMPANY DID NOT CARRY THE RIGHT TO THE NAME OF SUCH CORPORATION.

Calif. Civil Code, Sec. 992, provides:

"The good-will of a business is the expectation of continued public patronage, but it does not

include a right to use the name of any person from whom it was acquired."

Civil Code, Sec. 993,

also provides:

"The good-will of a business is property, transferable like any other, and the person transferring it may transfer with it the right of using the name under which the business is conducted."

The District Court refused to allow the receiver to sell the name "Thomas Day Company", and the corporation did not make such a sale so that all that actually passed under the sale was the good-will and the business of Thomas Day Company. The franchise, the corporate existence and the name "Thomas Day Company" all remain with such company. There is nothing legally to prevent such company from carrying on any business (other than for the present the lighting business) it might desire to operate.

X.

THE DISTRICT COURT ERRED IN ALLOWING THE RECEIVER TO SELL TO THE PURCHASER THE RIGHT "TO HOLD ITSELF OUT AS THE SUCCESSOR OF THOMAS DAY COMPANY", FOR SUCH AN ORDER PERMITTED THE RECEIVER TO DO INDIRECTLY THAT WHICH HE COULD NOT DO DIRECTLY, NAMELY, IN EFFECT SELL THE NAME OF THE COMPANY.

It will be noted that the order did not provide that the purchaser might hold itself out as *the successor of the business and good-will of Thomas Day Com-*

pany; such a sale and order in all probability would have been valid for the purchaser actually purchased all of the physical property of the company and also the good-will thereof so that the designation of such purchaser as the *successor of the business and good-will of Thomas Day Company might be correct,* but the designation *"successor of Thomas Day Company"* is not correct in that it does not state the truth, for as long as Thomas Day Company, as a corporate entity using that name and conducting its corporate business thereunder, remains in existence, it, the corporate entity of Thomas Day Company, and the name "Thomas Day Company", has no successor. As shown above, the District Court could not by its order dissolve such company nor could it take from it its corporate functions or name. The order as made only tends to confusion and opens the door to deception. The fact that an old, well established and honorable concern, such as Thomas Day Company has fallen upon unhappy days financially to the extent that its creditors have placed its business and assets in the hands of a receiver does not demolish its corporate entity and existence, even after its property and physical assets have been sold to satisfy such creditors, any more than does an individual who has been discharged in bankruptcy lose his identity or name. The same rule applicable to an individual in such bankruptcy situation has also been applied to corporations.

In

Theobald-Jansen Electric Co. v. Wood, 285 Fed. 29 (C. C. A. Sixth),

it was held:

"An adjudication against a bankrupt corporation does not terminate its corporate existence, in view of Bankruptcy Act, Sec. 4 (Comp. St., Sec. 9588), giving the corporation a right to apply for a discharge from its existing liability, and section 14 (Comp. St., Sec. 9598), giving all bankrupts the right to be discharged on proper showing, and the corporation is thereafter free to do business under its corporate name."

Also

In re Malko Milling & Lighting Co., 32 Fed. (2d) 825,

it was held:

"State held entitled to allowance of claim against bankrupt corporation for franchise tax imposed under Code Pub. Gen. Laws Md. 1924, art. 23, Sec. 109, though tax did not accrue until after state receivership, since receivership does not in law terminate the corporate existence, and the tax is made on the right to be a corporation, not on the actual exercise of it, regardless of what may be the reason for non-exercise."

A situation similar to that at bar arose in the case of

Armington v. Palmer, 42 Atl. (R. I.) 308,

where it was held that:

"Purchase of the manufacturing plant, machinery, and materials of a corporation does not

give the purchaser the right to use as its name the name of such corporation."

Further:

"As against a corporation entitled to its name of the 'Armington & Sims Engine Company,' and which has rightfully manufactured the Armington & Sims engines, a corporation subsequently engaging in the manufacture of such engines, and having the right to manufacture them, the patents on them having expired, and, by reason of the right to manufacture, having the right to describe them as the Armington & Sims engines, has not the right to use the corporate name 'Armington & Sims Company,' and hold itself out as the successor of the 'Armington & Sims Engine Company', which is still in existence, though there is no intention to deceive, and the latter corporation is not at the time in business, and there may be no present damages."

At the bottom of the last column on page 311, the court said:

"The third branch of the defense, the claim of authority, cannot prevail. The respondents did not acquire the right to use the name by purchase. They bought only the plant, machinery, stock, and such visible property. *The purchase of these does not carry the franchise or name of the corporation.* Undoubtedly, as the respondents claim, the right to use the name goes with the right to manufacture; but this applies only to the use of the name in connection with the article, while the question here involved is the right to use the name of a maker, which stands upon a different ground."

Here, Thomas Day Company is still in existence, and it will after these proceedings are terminated have the right to conduct such business as it may elect. True, all of its physical properties and patents, if any it has, have gone to the purchaser by virtue of a receiver's sale, but such sale has not taken from it the name "Thomas Day Company" or the franchise granted such corporation by the state to carry on in that name, and we respectfully submit that to allow the purchaser to hold itself out as "the successor of Thomas Day Company", would be to permit it to represent to the public that it is in truth and in fact the successor of the corporate entity of Thomas Day Company and of such name. We reiterate again that it would be giving to the purchaser the right to do indirectly that which it could not do directly. It would be practically the same situation as if a judgment creditor attempted to levy upon property on which the judgment debtor had declared a homestead and the court saying to such judgment creditor, "You cannot have the legal title to such property by reason of a declaration of homestead, and I have no jurisdiction or power to allow you to acquire such title, but, I will issue a permanent injunction against the judgment debtor requiring him to allow you to occupy and enjoy forever the possession of the property in question and restrain him, the judgment debtor, from ever making any claim to such property, or the possession thereof." Such, of course, in the absence of considerations not involved herein, could not be done.

CONCLUSION.

Accordingly, we respectfully submit that while in a proceeding such as the present the receiver had the authority to sell the good-will and physical assets of Thomas Day Company, still such receiver had no authority to purport to transfer to the purchaser the right to hold itself out as the "successor of Thomas Day Company" so long as such company was, and is, a corporate entity, and so long as neither the name nor the franchise of such company was subject to sale by judicial proceedings; the phrase "successor of Thomas Day Company" means but one thing, legally or in the mind of the public generally, namely, that such purchaser is the successor not only of the business and good-will of such company but of the name, corporate franchise, and its entire corporate structure as well.

Respectfully submitted,

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No. 6077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

16

THOMAS DAY COMPANY, a corporation, and WHITMAN SYMMES,
Appellants,

vs.

CLAUDE R. KING, Receiver of Thomas Day Company, ROBERTS MANUFACTURING COMPANY, a corporation, and GILL VIRDEN COMPANY, a corporation,
Appellees.

Brief of Roberts Manufacturing Company, a Corporation, Appellee.

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Brief of Roberts Manufacturing Company, a Corporation, Appellee.

FOREWORD.

On November 25th, 1929, United States District Court for the Northern District of California, Southern Division, in an equity action brought in that court entitled "Gill Virden Company, a corporation, complainant, v. Thomas Day Company, a corporation, defendant", made an order confirming the sale of the

assets of Thomas Day Company, which sale had been theretofore made upon notice in open court on the 17th day of November, 1929.

The regularity of the proceedings leading up to this sale are not challenged upon this appeal and an examination of the Transcript shows that there is no question about the regularity of the sale and all proceedings leading up thereto.

The order confirming said sale is set forth in the Transcript, pages 43 to 46, and is followed by the deed of conveyance and bill of sale executed by the Receiver to Roberts Manufacturing Company, the successful bidder, set forth on pages 46 to 50.

The assets so sold are enumerated and set forth in the order confirming the sale on pages 44 and 45 of the Transcript, which enumeration need not be here repeated except as to the concluding paragraph thereof.

The sale included the physical assets of Thomas Day Company, and

> "the business and the goodwill of the business of Thomas Day Company; the right of Roberts Manufacturing Company to hold itself out as the successor of Thomas Day Company and as having acquired the goodwill thereof."
>
> *Transcript,* page 45.

The appeal is directed to the language above quoted.

REPLY TO APPELLANTS' BRIEF.

Appellants' brief upon analysis can be divided under two headings:

First, certain admissions made by appellants which we claim determine the question against them.

Second, appellants have set up a number of "men of straw" and then proceeded to demolish them.

APPELLANTS' ADMISSIONS.

Let us first refer to the Transcript of Record herein.

In the bill in equity for receiver, in the case of *Gill Virden Company v. Thomas Day Company* (Transcript, pages 2 to 8) it is alleged among other things:

> "The property of defendant could be sold as a whole and a going concern for a much larger sum than if sold in smaller parcels under judicial process."
>
> *Transcript,* page 5.

The bill also alleges that it is to the best interests of the creditors that a Receiver be appointed to take custody and control of the assets of defendant, operate its business and, if possible, pay the claims of the creditors

> "and if not possible, under the jurisdiction and order of this Court to sell said property as a whole for the like use and benefit of complainant and other creditors of the defendant."
>
> *Transcript,* page 6.

The answer of the defendant admits all of the allegations of the bill of complaint as true, and joins in the prayer of the bill. This answer is verified by the appellant Whitman Symmes.

Transcript, pages 9 and 10.

Turning to appellants' brief, we find on page 6 this admission:

> "At the outset it is admitted that the receiver had the authority to make, and the court the power to confirm, a sale of the business and physical assets and also the goodwill of the business of Thomas Day Company."

To our mind this admission disposes of the appeal. Because this is precisely what was done by the court below and the court below went no further except to supply the necessary incidents of a transfer of the goodwill necessarily included therein, without which a transfer of the goodwill would be absolutely inoperative.

WHAT WAS SOLD AND WHAT WAS NOT SOLD.

Let us see what the order complained of did, and what it did not do.

The court confirmed a sale to Roberts Manufacturing Company of all the assets of Thomas Day Company, including

> "the business and the goodwill of the business of Thomas Day Company; the right of Roberts Manufacturing Company to hold itself out as

the successor of Thomas Day Company and as having acquired the goodwill thereof."

Transcript, page 45.

It did *not* sell to Roberts Manufacturing Company the name of Thomas Day Company or its franchise to be a corporation; it did not purport to suspend its corporate functions; it did not dissolve the corporation or affect its right to be a corporation.

For this reason we do not answer appellants' argument based upon the untenable assumption that the court did any of these things.

WHAT IS THE "GOODWILL" OF A GOING CONCERN?

Appellants admit that the court had power to sell the goodwill of the business of Thomas Day Company.

"The goodwill of a business is the expectation of continued public patronage."

Civil Code of California, Sec. 992.

"Goodwill was defined by Lord Eldon, in *Cruttwell v. Lye,* 17 Ves. 335, 346, to be 'nothing more than the probability that the old customers will resort to the old place,' but Vice-Chancellor Wood in *Churton v. Douglas,* Johns. (H. R. V.) 174, 188, says it would be taking too narrow a view of what is there laid down by Lord Eldon, to confine it to that, but that it must mean every positive advantage that has been acquired by the old firm in the progress of its business, whether connected with the premises in which the business was previously carried on, *or with the name of*

the late firm, or with any other matter carrying with it the benefit of the business."

Menendez v. Holt, 128 U. S. 514; 32 Law. Ed. 526.

The goodwill of a business as so defined can be sold under the California authorities.

"The goodwill of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired."

C. C. 992.

BUT

"The goodwill of a business is property, transferable like any other, and the person transferring it *may transfer with it the right of using the name under which the business is conducted.*"

C. C. 993.

In a case involving the dissolution of a copartnership the court said:

"Goodwill is property recognized and protected by the law as such and capable of sale and transfer from one owner to another. *It is an asset which may be sold in connection with a business.*"

Ruppe v. Utter, 76 Cal. App. 19, 25.

"Section 992 of the Civil Code provides that the goodwill of a business does not include the right to use the name of *any person* from whom it was acquired, but the judgment does not give to defendant such a right, but merely the right

> to use what was found to have become an *impersonal designation which had become a trade name* and which *was transferable with the goodwill of the business* under the provisions of section 993 of the Civil Code."
>
> *Reid v. St. John,* 68 Cal. App. 348, 356.

It follows that under the California authorities Thomas Day Company could have transferred to a purchaser the goodwill of its business and the right of using the name under which the business is conducted.

If Thomas Day Company could make such a sale, so could the Receiver. In other words, the Receiver could sell all the rights of Thomas Day Company which it itself could have sold. In a well considered Ohio decision, the syllabus by the court is as follows:

> "Upon the dissolution of a trading copartnership, its assets, including the goodwill of the business, may be sold as a whole, either by the partners directly, or through a receiver under an order of the court in a case to which they are parties; and a purchaser thereof, under either method of sale, is entitled to continue the business as the successor of the firm, and make use of the firm name for that purpose."

The language of the court is as follows:

> "We are not reluctant, therefore, in holding that upon the dissolution of a trading copartnership its assets, *including the goodwill of the business,* may be sold as a whole, either by the partners directly, or *through a receiver* under an order made by a court in a case to which they are parties; and that a purchaser thereof under

> either method of sale is *entitled to continue the business as the successor of the firm, and make use of the firm name for that purpose.* And, further, that where the purchaser transfers the property so acquired by him to a corporation of which he is a member, organized to succeed to the business, it may carry on the business in the same manner under a corporate name including the name which had been used by the firm. If it is desired to limit the right of the purchaser or his vendee in the use of the firm name, or exclude such right altogether, it should be done by stipulation in the contract when the sale is made by the partners, or by a provision to that effect in the order, when the sale is made through the court."
>
> *Snyder Manufacturing Co. v. Snyder,* 54 Ohio St. 86; 31 L. R. A. 657.

The transfer of the goodwill of a business necessarily involves the right of the purchaser to hold himself out to the public as the successor to the old firm.

How could Roberts Manufacturing Company rely upon "the expectation of continued public patronage" unless the public be informed that it has acquired the business and the goodwill of the business?

How could such a transfer be effective if the purchaser could not apprise the public that it had succeeded to the business of Thomas Day Company and had acquired the goodwill thereof?

Unless the purchaser could hold itself out as the successor of Thomas Day Company and as having acquired the goodwill thereof, the sale to it of the goodwill would be absolutely ineffectual.

This results from the nature of the "goodwill" of a business, an evanescent, intangible thing that can only operate through publicity.

The courts have always recognized the right of the purchaser of a "goodwill" to hold itself out as the successor of the former concern.

> "The questions principally discussed relate to the right of a purchaser of the goodwill to use the firm name. The right to use the firm name, for the purpose of designating the business carried on by a purchaser as a continuation of that done by the old firm, passes with a sale of the goodwill. This is an exclusive right. The limitations upon its exercise are only such as are necessary to protect the rights of the partners or others. Such a limitation is expressed in Rev. Laws, c. 72, sec. 5. The purchaser has no right to use the name in such a way as to indicate that the business is then being conducted by *persons* who have no connection with it. Each member of the old firm, like everybody else, has a right to use his own name in a new business, either alone, or with the names of others who are associated with him. But after a sale of the goodwill, no one but the purchaser can lawfully use the firm name as an indication that his business is a continuation of that of the old firm.
>
> A convenient way of using the firm name by a purchaser of the goodwill, if rights of third persons are involved, is by advertising as the *successor to the former firm.*"
>
> *Moore v. Rawson,* 199 Mass. 493; 85 N. E. 586, 590.

In a recent California case it was said:

> "Under our code the goodwill of a business is property, transferable like any other, it being

'the expectation of continued public patronage.' (Civ. Code, secs. 992 and 993.) The transfer of the partnership business to the corporation necessarily involved a transfer of the goodwill of the business."

Clement v. Duncan, 191 Cal. 209, 222.

And in a well considered California case the court said:

"In this case, the transfer of the business was made, admittedly, by an instrument reading, in part, as follows: 'R. L. Reid * * * does by these presents sell unto the party of the second part * * * his right, title and interest of, in and to all of that certain drugstore business now being conducted under the name of Reid's Drugs * * * together with the goodwill thereof, all the stock of drugs and merchandise now on hand, all appliances and all equipment and fixtures used in connection with said business.'

Appellant contends that section 993 of the Civil Code made it necessary for plaintiff to expressly mention the name under which the business was conducted in order to transfer to defendant the right to use the same. But said section does not so provide. It reads: 'The goodwill of a business is property, transferable like any other, and the person transferring it may transfer with it the right of using the name under which the business is conducted.' That is precisely what the trial court has found that the plaintiff did—transferred with the goodwill of the business, the right to use the name under which it was conducted."

Reid v. St. John, 68 Cal. App. 348, 355-6.

In a well considered New York case the court said:

> "We think that the learned court below was correct in so far as it decided that the firm name was inseparable from the goodwill, and hence just as much a part of the assets of the firm as the goodwill itself. This proposition seems to be supported by the great weight of authority."
>
> *Slater v. Slater,* 175 N. Y. 143; S. C. 61 L. R. A. 796.

CONCLUSION.

For the foregoing reasons we respectfully submit that the court below did not err in its order confirming the sale to Roberts Manufacturing Company.

The sale was ordered and held for the purpose of realizing as large a sum for the creditors of Thomas Day Company as could be obtained.

It is obvious that the creditors were entitled to receive not only the value of the stock of merchandise on hand but the value of the business as a going concern and the value of the goodwill thereof.

But no person would bid a substantial sum for the goodwill of the business unless he were entitled to advise the public that he had purchased the goodwill of the business.

Roberts Manufacturing Company bid at the sale the sum of $42,500.00 for the physical assets and for the

goodwill of the business. Manifestly a considerable portion of this sum was bid for the goodwill.

It is equally obvious that if the goodwill of the business were eliminated a much less sum would have been realized for the benefit of the creditors.

In view of all these considerations we submit that the order appealed from must be affirmed.

Respectfully submitted,

THEODORE J. SAVAGE,
Attorney for Roberts Manufacturing Company, a corporation, Appellee.

No. 6077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS DAY COMPANY (a corporation) and WHITMAN SYMMES,

Appellants,

vs.

CLAUDE R. KING, Receiver of Thomas Day Company, ROBERTS MANUFACTURING COMPANY (a corporation), and GILL VIRDEN COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEE, CLAUDE R. KING, RECEIVER OF THE THOMAS DAY COMPANY.

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BRIEF FOR APPELLEE, CLAUDE R. KING, RECEIVER OF THE THOMAS DAY COMPANY.

STATEMENT OF THE CASE.

The statement of the case is correctly set forth in appellant's brief. Appellant admits that certain points assigned as error are not well taken (Appellant's Brief page 6) and the issue on this appeal is thereby narrowed to one question.

Did the Court have jurisdiction to authorize a sale wherein the purchaser was allowed to hold itself out as the successor to the Thomas Day Company.

I.

THE SALE DID NOT VIOLATE ANY OF THE LAWS OF THE STATE OF CALIFORNIA.

Counsel states that the management and operation of the property must be in accordance with the requirements of the valid laws of the State of California.

There are two answers to this contention. In the first place we are not now concerned with either *management* or *operation* of the property. The property and all of the assets have been sold.

Secondly the *sale* which is under consideration does not depend for its validity on effect upon any positive law of the State of California; it is enough if the sale and the terms thereof do not violate any law of the State of California.

Next it is contended that the Federal Court will be governed by the state laws in receiver's sales. In an equity receivership, such as this one, there are no laws of the state to be followed.

II.

RESPONDENT DOES NOT CONTEND THAT THE SALE OF THE ASSETS OF THE CORPORATION WORKED A DISSOLUTION.

No contention has been made by respondent Receiver that the corporation has been dissolved. Admittedly the only method of dissolving the corporation is the mechanism provided by the laws of the state of incorporation.

But the decree confirming the sale does not attempt to work a dissolution of appellant. On its face the decree does not show a lack of jurisdiction.

III.

THE APPOINTMENT OF THE RECEIVER, WHILE NOT DISSOLVING THE CORPORATION, OPERATED TO SUBJECT ALL OF THE ASSETS OF THE CORPORATION TO THE JURISDICTION OF THE DISTRICT COURT.

This includes the goodwill and trade name; and this is all that was sold by the Court.

(a) Goodwill as an asset in the jurisdiction of the court.

At the outset it might well be remembered that the decree appointing the Receiver in this action was consented to by the Company. This under the practice now recognized by the Federal courts, sitting in equity, of extending the consent receivership to the situation of private corporations which are solvent at the time but presently unable to meet their obligations by reason of 'frozen assets'."

First National Bank v. Stewart Fruit Co., (1927) 17 Fed. (2d) 621.

The plan of the receivership was the operation of the business as a going concern and the liquidation of its frozen assets for the purpose of meeting its liabilities. The appellants here consented to the order of appointment. It developed after further consideration that the inventory of the business had been

overvalued and that the concern was in fact insolvent. At a meeting of the creditors it was decided to offer the business as a whole to the highest bidder for cash. (Transcript pages 27, 28.)

The highest bid was submitted by a competitor of the insolvent concern.

In this situation the Honorable A. F. St. Sure confirmed the sale of the goodwill. As an incident thereto the order confirms the sale in the following language:

> "The business and goodwill of the business of the Thomas Day Company; *the right of Roberts Manufacturing Company to hold itself out as the successor of Thomas Day Company and as having acquired the goodwill thereof.*"
>
> (Transcript page 45.)

It will be noted that the sale of the goodwill and the right of the purchaser to hold itself out as the successor are inseparably interwoven.

Under the consent decree the Receiver succeeded to all of the assets of the corporation. The decree provides:

> "It is hereby ordered, adjudged and decreed that Charles F. Duval be, and he is hereby, appointed Receiver of defendant, Thomas Day Company, and of all of the property and assets of said defendant."
>
> (Transcript page 11.)

The goodwill of a business in an asset in the hands of a receiver.

Tardy's, Smith on Receivers, 2d Ed. (1920). Vol. 2, page 1791, Section 645.

> Goodwill is an asset in bankruptcy and it is the subject of sale with, but only with, the business in which it has been used.
>
> *Nims, Unfair Competition and Trade-Marks,* 3d Edition (1929), page 82, Section 26.

(b) The right to use the term "successor to" is part of the sale of the goodwill.

One who purchases the goodwill of a firm or corporation is entitled to hold himself out as the "successor to" the old firm or corporation.

In *Smith v. David H. Brand & Co.,* 67 N. J. Eq. 529, 58 Atl. 1029, a partnership under the name "Brand and Smith" sold all of its assets and "goodwill" to a corporation named "David H. Brand & Co." This corporation advertised itself as "Successors of Brand & Smith." A former partner sought to enjoin the use of this description and the Court denied the injunction.

This is likewise true in the case of a sale by a corporation of its goodwill and trade name. In *Van Dyk v. Van Dyk & Reeves,* 245 N. Y. 516, (1927) 157 N. E. 840: sustaining 217 App. Div. 781, 217 N. Y. S. 105; the Court considered the following situation:

An action was brought by a stockholder of a New York Corporation whose assets, corporate name and franchises had been sold in receivership proceedings under an order of the United States District Court, to restrain the use of the corporate name by a new corporation, to which the assets had been assigned by the purchaser from the receiver. The defendants moved to dismiss for failure to state a

cause of action. The motion was denied by the trial Court; reversed in the Appellate Division and the reversal sustained by the Court of Appeals.

The Appellate Division held that the Federal Court had jurisdiction of the old corporation and of plaintiff and had power to restrain the old corporation from making any use of the corporate name that would interfere with the good will bought by the new corporation; and consequently plaintiff was not entitled to equitable relief, and that the question whether, so long as the old corporation remained undissolved, the new corporation could lawfully be permitted to incorporate under the same corporate name, was a matter with which the State and not this plaintiff was concerned.

This decision was affirmed by the highest Court in New York State. It seems to be the only case directly in point which our limited facilities have been able to find.

In that case the language of the Appellate Division is equally applicable to a certain phase of this case. After stating the facts the Court declared:

> "The old corporation had no assets, is not doing business of any kind, and seems to be defunct. No injury, therefore, could come to it or the plaintiff by the use by the defendant corporation of the name of the old corporation. On the record before the Court it clearly appears that the action is not brought in good faith, but solely for the purpose of harassing the defendant corporation. There is not a suggestion that the old corporation is likely to continue business."
>
> (217 N. Y. S. 105.)

IV.

THE PLAINTIFFS ARE NOT PROPERLY BEFORE THE COURT IN THAT THEY ARE NOT AGGRIEVED BY THE DECREE OF CONFIRMATION OF SALE.

At the time the sale was confirmed no evidence was offered to show any damages to the appellant by reason of the sale.

In fact, under the stockholders liability law, the more realized from the sale the greater the benefit accruing to the stockholders.

No evidence was offered to show that appellants were suffering or about to suffer any damage. Under the order of appointment of the Receiver the appellants could not engage in business without being in contempt of Court. If they have any assets the Receiver is entitled to them.

The insolvent party cannot complain of the sale or use of its name by the purchaser from the Receiver.

In re Sawilowsky, 284 Fed. 975;

See also

Sawilowsky v. Brown, 288 Fed. 533.

V.

THE PROPOSITION THAT A FEDERAL COURT HAS NO JURISDICTION OVER A CORPORATE NAME BECAUSE OF THE SOVERIGNITY OF THE VARIOUS STATES IN GRANTING CORPORATE CHARTERS IS AN OBSOLETE SHIBBOLETH LONG SINCE DISCARDED BY THE COURTS.

In this case the position taken by His Honor Judge St. Sure is well expressed by Judge Lamm in *State v. Shelton,* 238 Mo. 281, 142 S. W. 417:

> "If a court of equity may take over the management of corporate property through its receiver, as we have just held, it may be allowed to act sensibly with it. I hold this truth to be self-evident, viz: One of the inherent powers of a court of equity is the right to act with good sense. If the corporate project has been abandoned, or has broken down, or the property is perishable, and is deteriorating, if there are no corporate means at hand for conserving it, and the interests of creditors and stockholders are best served by a sale, what good reason can be given why the chancellor, who holds the property of an insolvent corporation through his receiver, may not sell it? Why hold it until it becomes worthless? Why return it to the wasteful, inefficient, or corrupt hands from which equity rescued it?"

But, appellants contend, the court, lacking jurisdiction, its hands are fettered and it cannot use ordinary good sense.

Is there some mechanism, some magic formula, under which a Court is deprived of jurisdiction because the right to corporate existence is dependent upon one of the states? It is submitted that there is no such jurisdictional limitation.

The fact is that the corporation has already consented to an injunction which substantially suspended the exercise of the corporate powers in the original bill in this action. (Transcript page 9.)

In numerous cases the Federal courts have enjoined the use of a corporate name, notwithstanding the fact that the name was being permissively used under the laws of the state of incorporation. It is sufficient to

cite but two of a long line of cases illustrating this point.

Hudson Tire Co. v. Hudson Tire and Rubber Corporation, 276 Fed. 59;

Peck Bros. & Co. v. Peck Bros. Co., 113 Fed. 291.

In the latter case the Court expressly refused to follow an Illinois case wherein the Illinois court had reached an opposite conclusion and stated clearly the proposition that it had jurisdiction to adjudicate the use of the corporate name.

The Court said in part:

"There is in the term 'sovereignty' no magic to conjure by * * *."

CONCLUSION.

In conclusion we simply state that the appellant by virtue of the admissions in his brief has narrowed the question down to one of jurisdiction and on the question of jurisdiction both logic and the authorities are against him.

Furthermore, on equitable grounds it would not seem that the parties appealing are properly in good standing before this Court in that they consented to the decree of adjudication and appointment of a Receiver and should not now be heard to complain of a sale which in any event must redound to the benefit of the stockholders and which cannot possibly damage a corporation which is not operating and had no assets and has not offered any proof of any damage real or supposititous.

In the interests of the efficient administration of estates in the hands of Federal equity receivers and in the interests of all creditors of such estates the law should favor sales which realize for the estate the most amount of money that can be obtained. The decree should be affirmed.

Dated, San Francisco,
June 9, 1930.

Respectfully submitted,

KNIGHT, BOLAND & CHRISTIN,
Attorneys for Appellee, Claude R. King,
Receiver of the Thomas Day Company.